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A

TREATISE

ON

COURTS MARTIAL.

TO WHICH IS ADDED,
AN ESSAY ON
MILITARY PUNISHMENTS
AND REWARDS.

THE *THIRD EDITION*,
WITH ADDITIONS AND AMENDMENTS,

BY

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Captain of the Royal Regiment of Artillery, Major
in the Army, and Depute Judge-Advocate to his
Majesty's Troops, serving in North-America.

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LONDON,

PRINTED FOR J. MURRAY, NO. 32, FLEET-STREET.

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Rec. June 20, 1902

TO HIS EXCELLENCY

THE HONOURABLE

T H O M A S G A G E ,

General and Commander in Chief of all his
Majesty's Forces in North America, &c.

S I R,

I AM not to follow the beaten path of dedicators. The language of adulation is not that of a soldier; and your understanding is superior to it.

THE qualifications which distinguish your public and private life are very generally known; and they have endeared you in a most particular manner to those who have had the honour to serve under you.

INSTEAD of an eulogium, I beg to present you with a treatise, to the subject

DEDICATION.

ject of which my attention was called by your appointment of me to act as Judge-Advocate. Induced by this consideration, and conscious of your anxious regard for justice and equity, I have ventured to submit my work to your protection. Your name and consequence will draw to it a respect which it might not otherways have been able to obtain.

I HAVE the honour to be,

with the most entire respect,

S I R,

Your most obedient,

and most faithful

humble servant,

STEPHEN PAYNE ADYE.

ADVERTISEMENT.

LITTLE has been written upon the subject of courts-martial; and that little is imperfect. My way of life made me turn my attention to it; and I became desirous of supplying a deficiency that was known and palpable. It was my wish to be as full and complete as possible; and my best efforts have not been wanting to give utility and importance to my work. I have availed myself of every information I could obtain from books, and have joined to it the knowledge I had procured from actual experience. With regard to my language, I have endeavoured to be clear rather than florid; and, contented with being understood, I have left to men of letters the prize of eloquence.

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A
T R E A T I S E
O N
C O U R T S M A R T I A L.

PART I.
*Of MARTIAL LAW and MILITARY COURTS
in General.*

CHAPTER I.
*Of the Origin and Progress of Martial Law
in England.*

THE court of chivalry or * marshal's court, the judges of which were the lord high constable and earl marshal, is the fountain of martial law in England†; but the original institution of these officers seems

* *Mareshall*, Saxon, from *marc*, a horse, and *schall*, a governor.

† 4 Institute, 123

not to have been exactly ascertained by our ancient historians. In the laws before the conquest, we read, observes Sir Edward Coke, *de Heretochiis* or *Heretogiis*, i. e. *duc-toribus exercitus*, ab *here*, exercitus, and *tæcu ducere*, which agree with either of these great officers, *constabullarius* or *marischallus**; but we find no mention of them by these titles, till they became part of the *aula regis*, a supreme court established by William the Conqueror, under the direction of a chief justiciar, and composed of the great officers of state, each of whom had his particular jurisdiction; the constable and earl marshal presiding in matters of honour and arms, and determining according to the law military, and the law of nations; and when Edward I. new-modelled the whole frame of our judicial polity, and broke and subdivided the *aula regia* into distinct courts, they were appointed to preside over the court of chivalry†.

* 4 Institute, 127.

† Blackstone's Commentaries, b 1. p. 37, 39.

THE jurisdiction of this court, according to Sir Mathew Hale*, was declared and limited by common law, as follows: First, negatively; its officers were not to meddle with any thing determinable by the common law, and therefore, inasmuch as matter of damages, and the quantity and determination thereof, is of that cognizance, the court of constable and earl marshal could not, even in such suits as were proper for their authority, give damages against the party convicted before them, and at most could only order reparation, in point of honour. Neither could they, as to the point of reparation in honour, hold plea of any such words or things wherein the party was relievable by the courts of common law.

SECONDLY, affirmatively: Their jurisdiction extended to matters of arms and matters of war, viz. as to matters of arms,

* Hale's Hist. of the Common Law, c 2. p. 86, 37, 38.

(or heraldry) the constable and marshal had cognizance, viz. touching the right of coats of armour, bearings, crests, supporters, pennans, &c. and also touching the right of place and precedence, in cases where either acts of parliament, or the king's patent, (he being the fountain of honour) had not already determined it; for, in such cases, they had no power to alter it. These things were anciently allowed to the jurisdiction of the constable and marshal, as having some relation to military affairs, but so restrained that they were only to determine the right, and give reparation to the party injured, in point of honour, but not to repair him in damages.

BUT as to matters of war, the constable and marshal had a double power, viz. 1. A ministerial power, as they were anciently two great ordinary officers in the King's army; the constable being in effect the king's general, and the marshal being employed in marshalling the King's army, and

and keeping the list of the officers and soldiers therein; and his certificate being the trial of those whose attendance was requisite*.

2. A judicial power, as, 1st, Appeals of death or murder committed beyond the sea, according to the course of the civil law; 2dly, The rights of prisoners taken in war; 3dly, The offences and miscarriages of soldiers, contrary to the laws and rules of the army. For always, preparatory to an actual war, the kings of this realm, by advice of the constable (and marshal) were used to compose a book of *rules and orders*, for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders, and this was called *martial law*. We have extant in the black book of the admiralty, and in other places, examples of such military laws, and especially that of the 9th of Richard II.† composed by the

* Littleton, Sect. 102.

† A curious pamphlet has lately been published,
A 3 entitled,

the king, with the advice of the Duke of Lancaster and others.

THE extent of power of this court has also been ascertained and limited by different statutes, particularly that of the 13th Richard II. c. 2, which passed upon a complaint of the commons that the court of the constable and marshal had encroached to themselves contracts, covenants, trespasses, debts and detinues, and many other actions pleadable at common law, in prejudice to the king and his courts, and to the oppression of the people; and it is herein enacted, that, "*To the constable it appertaineth to have cognizance of all contracts and*

entitled, The Ancient Code of Military Laws, for the Government of the English Army under King Henry V. enacted in France.

Many of the regulations in this Code bear, as the author observes, a great similarity to our modern articles of war; but he is mistaken in saying that this is the most ancient code of military laws for the government of an English army that has been handed down to us,

deeds

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deeds of arms, and of our war, out of the realm, and also of things that touch war within the realm, which cannot be determined by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time. And by 1 Hen. IV. c. 14. it is enacted, That all appeals of things done within the realm, shall be tried and determined by the good laws of the realm, made and used in the time of the king's noble progenitors; and that all appeals to be made of things done out of the realm, shall be tried and determined before the constable and marshal of England for the time being."

THE post of high constable was hereditary in the line of the Bohuns, Earls of Hereford and Essex, and afterwards in that of the Staffords, and descended in right of inheritance to Edward Duke of Buckingham*; but upon his being attainted in the 13th of Henry VIII. the office be-

* 4 Inst. 125.

came forfeited to the crown, and no permanent high constable has been since appointed (but only *pro hac vice*, at coronations, &c.) the authority being deemed too ample for a subject; so ample, that when the Chief-Justice Fineaŭx was asked by Henry VIII. how far it extended, he declined answering, and said, the decision of that question belonged to the law of arms, and not to the law of England*.

THE office of earl marshal, which is hereditary in the Duke of Norfolk's family, still exists; but upon the suppression of the post of high constable, it was strongly insisted on†, and afterwards given as the opinion of a committee of the house of commons, appointed in the year 1639‡ to enquire into the abuses of this court, that the lord marshal could not hold this court without the constable, and this doe-

* Blackstone's Comment. b. 4, p. 264.

† Vide Dr. Oldis's Case, Parl. Cases, 64, 66.

‡ Rushworth's Collection, v. 2, p. 1055, 1056.

trine was universally agreed to, in appeals of a capital nature*. It was notwithstanding held from time to time, during the reigns of Henry VIII. Elizabeth, and James I. by the marshal alone, with the concurrence of the judges of the common law.† It was generally confined, however, to civil causes; and although the court of chivalry has never been absolutely abolished by legal authority, yet it is almost entirely laid aside, even in civil matters, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments, as it can neither fine nor imprison, not being a court of record.‡

As to the matter of contracts, all such are now cognizable in the courts of Westminster

* 1 Inst. 746. Cases in Parliament, 61. Rushworth, v. 2, p. 107. 2 Hawkins's Pleas of the Crown, p. 12, 13.

† 4 Inst. 126. Farresly's Reports, 126.

‡ Salkeld's Reports, 553. Blackstone's Comment. b. 3, p. 68.

Hall,

Hall, if not directly, at least, in fiction of law; as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton, for the locality or place of making it, is of no consequence with regard to the validity of the contract*.

THE office of Earl Marshal (as just now observed) still subsists, but his authority seems at present to be confined to the adjusting of armorial ensigns, bearings, &c. settling the rights of place and precedence; marshalling and conducting coronations, marriages, funerals, &c. of the royal family; and proclaiming war and peace.

THOUGH the authority of the court of chivalry, with regard to matters of war, &c. both within and without the realm, not determinable by common law, was first established by the common law, and afterwards confirmed by different statutes, as has already been taken notice of, and was

* Blackstone, b. 3. p. 104-5.

never objected to, even in criminal cases, till the post of high constable was laid aside; yet we find its jurisdiction encroached upon much earlier, for by statute of the 18 Henry VI. desertion from the King's army was made felony, and by 7 Henry VII. c. 1. and 3 Henry VIII. c. 5. benefit of clergy is taken away, and authority given to justices of the peace, to enquire thereof, and hear and determine the same. And Rapin* quotes an instance of Henry VII. having ordered those accused of holding intelligence with the enemy, after the battle of Stoke, in 1487, to be tried by commissioners of his own appointing, or by courts martial, according to the martial law, instead of the usual course of justice, which was not so favourable to his design of punishing them only by fines, and thereby filling his coffers; for in cases of this sort, the laws of England admitted of no medium between death and an absolute discharge, and the

* Tindal's translation of Rapin's Hist. of England, V. 5. p. 244.

King would have neither. This however seems to have been an arbitrary and illegal exertion of power in this avaritious monarch, and not authoris'd by any law of the land.

FROM the time of the court of chivalry being abridged of its criminal jurisdiction by the suppression of the post of high constable, to the Revolution, there appears to have been no regular established court, for the administration of martial law. For although the court of chivalry still continued to be held from time to time by the earl marshal, its authority (as was before observed) extended only to civil matters; and notwithstanding desertion was by the 2d and 3d Edw. VI. c. 2. made felony without benefit of clergy, and other military crimes were made punishable by fines, imprisonment and loss of service; and by 39 Eliz. c. 17. idle and wandering soldiers and mariners were to be reputed as felons, and to suffer as in cases of felonies, without benefit
of

of clergy (with some exceptions); and the justices of assize and gaol-delivery were to hear and determine these offences; yet we find many instances, during this period of our history, of other courts being erected for the administration of martial law; and not only military persons made subject to it, but many others punished thereby; some entirely at the discretion of the crown, and others again by appointment of the parliament only. In the reign of Mary, a proclamation was issued, that whoever was possessed of heretical books, and did not presently burn them, without reading them, or shewing them to others, should be deemed a rebel, and executed immediately by martial law; and in the succeeding reign of Elizabeth, it was no less an object of complaint; for in cases of insurrection and public disorder, it was not only exercised on military men, but on the people in general; and was extended also to those who brought bulls, &c. from Rome. We read of a very extraordinary exertion of the prerogative in a matter

ter of this sort by Queen Elizabeth, who, upon some disturbances from the apprentices of London, constituted the lord mayor provost-martial, with power to proceed against them according to martial law *; and it was a circumstance of nearly a similar nature, though a more flagrant breach of the laws, that occasioned the enacting of the petition of rights in the third year of the reign of Charles I. This monarch, inheriting his father's notions of kingly power, and entertaining a contempt for the commons, endeavoured to raise money without their consent, and, among other arbitrary methods which he took to effect his purpose, sent commissioners into the different counties, to demand a certain sum from each individual, according to his estate, and soldiers were ordered to be quartered upon the houses of those who were backward in their contributions; and if injured or insulted by the soldiery, they could not appeal to the ordinary courts of justice, but

* Rymer's Fædera, v. 16.

were

were obliged to seek redress from a council of war, which the king had instituted, with power to proceed within the land against such soldiers, mariners, and other dissolute persons joining with them, as should commit murder, felony, robbery, or other outrage or misdemeanour, as was used in armies in time of war, and condemn and cause such offenders to be executed according to martial law. Finding however that these methods were ineffectual, he was obliged, in the end, to ask the assistance of the commons, who on their part were become resolutely bent on granting no subsidies, till the grievances which the people suffered were redressed; and Charles perceiving that money, which he could no longer do without, was to be had on no other terms, gave his assent at last to the bill prepared by the commons, called the *petition of rights*, one clause of which was, that the commissioners for proceeding by martial law should be dissolved and annulled, and no such commission be issued for the future.

THIS

THIS petition of the commons, which by the concurrence of the other branches of the legislature became a law, was not however sufficient to reconcile the king and his parliament. It would be foreign to my present purpose to enter into a particular detail of the disputes which afterwards ensued between them, and proved fatal for a time to monarchy. It is sufficient to observe, that upon the different parties having recourse to arms, they soon found that armies without discipline and military subordination, were like bodies without souls, and that these were only to be acquired by establishing martial law amongst them.

INDEED, even before they came to an open rupture, a committee of ten lords was sent to the king to desire that he would disband five regiments; and his majesty having consented thereto, the Earl of Holland, then general of the English army, gave it as his opinion, that the army could not well be disarmed, without some power to punish such

such as should mutiny or refuse to be disbanded; and in consequence thereof, it was agreed to propose a mutiny act to the commons, which was only to serve that particular purpose, and die with it, but the commons thought it better to desire the general to execute martial law himself on such as were refractory*.

BUT when matters were brought to extremity, and distinct armies formed under the denomination of the royal and parliamentary forces, a petition was presented to the house of lords by the lord mayor, aldermen and commons of London, praying that among other regulations in the parliamentary army, there might be a new establishment for, and such a council of war, and discipline in the said army, for the time to come, as might tend to the glory of God, the encouragement and defence of his people, procure a blessing thereupon, and be a pattern of reformation to all the rest of the

* Parliamentary Hist. v. 9. p. 432.

armies in the kingdom*. And soon after an ordinance appointing commissioners for executing martial law, passed the two houses of parliament.

THOUGH this ordinance could no more be deemed a legal authority for the exercise of martial law (from wanting the sanction and consent of the third branch of the legislature) than the execution of it merely at the discretion of the crown, yet it may be said to have reduced martial law to a more regular system; and as it appears in some measure to have been adopted as a model for the mutiny acts passed since the Revolution, I shall insert the principal articles of it.

By this ordinance, which passed in 1644, it was ordained that the Earl of Essex, general of the forces raised by the authority of the parliament, together with fifty-six others named therein (among whom were

* Parliamentary Hist. v. 13. p. 32. 33.

several

several peers, members of the house of commons, and field officers of the army) or any twelve or more of them, (whereof such of the members of either house of parliament, as hold commissions and commands in any of the armies or garrisons, and Sir Nathaniel Brett were to be three) should be commissioners and have full power and authority to hear and determine all such causes as belonged to military cognizance, according to the articles mentioned in the ordinance, and to proceed to the trial, condemnation, and execution of all offenders against the said articles, and to inflict upon them such punishment, either by death or otherwise, corporally, as the said commissioners, or the major part of them then present, should judge to appertain to justice, according to the nature of the offence, and the articles here ensuing, viz.

1. No person whatever was to go from the cities of London and Westminster, or any part of the kingdom, under the power

of the parliament, to the king or queen, or lords of the council abiding with them, or any commander or officer of the king's army; or to give or hold intelligence by letters, messages, or otherwise, with any arms against the parliament, without consent of both houses of parliament, or the committee appointed by ordinance of parliament for managing the war; the lord general of the forces raised by the two houses; or from the respective officers that should command in chief any of the said forces, upon pain of death, or other corporal punishment at discretion.

2. WHOEVER plotted, contrived or endeavoured the surrendering, betraying or yielding up to the enemy, or contrary to the rules of war, surrendered, betrayed, or yielded up any cities, towns, forts, magazines, under the power of the Parliament, were to be punished with death,

3. No person or persons whatever, not under the power of the enemy, should voluntarily

COURTS MARTIAL. 21

luntarily relieve any person, being in arms against the Parliament, knowing him to have been so in arms, with money, victuals or ammunition, upon pain of death or other corporal punishment, at discretion; nor should voluntarily and knowingly harbour or receive any person being in arms, as aforesaid, upon pain of punishment at discretion.

4. No officer or soldier should make any mutinous assemblies, or be assisting thereto, upon pain of death.

5. No guardian or officer of any prison was wilfully to suffer any prisoner of war to escape, under pain of death; or negligently, under pain of imprisonment, and further punishment at discretion.

6. WHOSOEVER voluntarily took up arms against the parliament, having taken the national covenant, should die without mercy.

B 3 7. WHATSOEVER

7. WHATSOEVER officer or commander had or should desert their trust, and adhere to the enemy, should die without mercy.

AND it was further ordained that the said commissioners, or any twelve or more of them (whereof the members of either house of parliament, as had commissions or commands in any of the armies or garrisons, and Sir Nathaniel Brett, were always to be three) should be authorised from time to time, so often as they should think fit, or should be ordered thereunto by both or either house of parliament, to sit in some convenient place within the cities of London and Westminster, or lines of communication, and to appoint a judge advocate, a provost marshal, and all other officers needful.

AND all mayors, sheriffs, justices of the peace, constables, bailiffs, and other officers, were to be aiding and assisting the commissioners in the execution of the premises; and the said commissioners and every other

other person assisting them, should be saved harmless, and indemnified for what they did therein by authority of parliament.

PROVIDED nevertheless that no member of either house of Parliament, or assistants of the house of peers, should be questioned or tried before the commissioners appointed by virtue of the ordinance, without assent and leave first obtained of both houses of parliament.

It was also provided that this ordinance, and the authority thereby given to the persons therein mentioned, should be in force for only four months from the making thereof; and that for any offence hereafter to be committed, it should not take place until eight days after the publication thereof, and any thing contained therein to the contrary notwithstanding.

SIR John Hotham and his son were among the first who were tried by a court

martial, under authority of this ordinance, and were sentenced to suffer death for betraying the parliament's cause; and the warrant for their execution was directed to the lieutenant of the tower, the sheriffs of London and Middlesex, the provost marshal, &c.

UPON the expiration of this ordinance, a new one for the same purpose was sent up from the commons to the other house, but the lords would not pass it in the manner and form they had sent it, alledging that this new law struck at several of their privileges, and concluded with this ancient adage, *Nolumus leges angliae mutari*; and the commons being as resolute on their part, nothing was concluded on with regard to this business at that time*; but the year following (1646) the house of lords consented to an ordinance of this sort, with some few alterations and additional pro-

* Parliamentary History, v. 14. p. 257.

visages, nine peers entering their dissent against it*.

By this ordinance, which was to continue in force only three months, Sir Thomas Fairfax, general of the parliamentary army, Major-General Skipton, and about forty more officers, civilians, and common lawyers, or any twelve or more of them, were appointed a court martial within London and Westminster, and the lines of communication, to sit on all such as should offend against the articles contained therein; which were nearly the same as those expressed in the former ordinance, with this additional one, That whoever came from the king's quarters, or had been there for a month past, or borne arms against the parliament, and should come into their quarters, without a pass, drum or trumpet, and not render himself up within forty-eight hours, should die without mercy.

* Parliamentary Hist. v. 14. p. 313. 314.

THE Commissioners were likewise empowered to issue warrants to sit at their discretion, and to appoint a judge advocate and provost marshal, and all mayors and sheriffs were ordered to be aiding and assisting, &c. but this ordinance was not to extend to any member of either house of parliament; and no sentence was to pass, but upon the testimony of two witnesses, or confession of the party; and no execution of death was to take place, till after six days notice to both houses of parliament.

No new parliamentary ordinance for martial law passed upon the expiration of this one; for indeed, very soon afterwards, the authority of the army, by the intrigues of Cromwell and his party, became superior to that of the parliament.

UPON a faction being raised in the army, by a set of men under the name of *Level-
lers*, whose object was that all parties should be reduced to a level, and that an equality
of

of possession and power should be established throughout the nation; for wherefore said they, in the true fanatical language of the times, should not a common soldier, enlightened by the holy spirit, have the same privileges with the commander? or why give the officer so many advantages contrary to the spirit of christian equality? Cromwell seized the chiefs of the mutiny, and without waiting for the authority of parliamentary ordinances, instantly hanged them up, and the rest returned to their duty. But in March 1649, monarchy being suppressed, and the house of lords voted useless, a bill was brought into the house of commons (now the only remaining branch of the legislature) for establishing a court martial within the cities of London and Westminster, and the late lines of communication, which was to be called the high court of justice; and it passed without a division, upon a proviso being inserted, that nothing contained therein should extend to the diminution of any power or authority formerly given to the

the lord general or his council of war, or to the admirals at sea, by the authority of parliament, for executing martial law*.

UPON the restoration of Charles II. one of the first steps taken by the parliament was to disband the army, and to regulate the militia, among whom a military subordination (though not without a violent contention in the house of commons) was established, whenever they were drawn out, and fines and imprisonments imposed upon them for particular crimes and omissions.

KING Charles however kept up 5,000 regular troops for guards and garrisons, by his own authority, which his successor James II. by degrees increased to 30,000; and more numerous armies were occasionally raised by authority of parliament, during Charles's wars with France and Holland; yet we find no act of parliament in the statute books,

* Parliamentary Hist. v. 19. 253.

for,

for the government of these troops; nor was it till after the Revolution, that a regular act of the whole legislature (which alone could give it the force of a law) passed for punishing mutiny and desertion, &c. by courts martial.

THIS act was occasioned by a mutiny in a body of English and Scots troops (among whom were the regiment of dragoons, now called the Scots Greys, and the Royal Scots regiment of foot) upon their being ordered to Holland, to replace some of the Dutch troops, which King William had brought over with him, and intended to keep in England. The Royal Scots regiment had been disgusted on Lord Dunbarton's being dismissed from the command of it, and Marshal Schomberg put in his room. It was insinuated to the English part of the mutineers, by the emissaries of James, that they, who were the only remains of the army that had continued faithful to their sovereign, were now to be punished

punished for that fidelity which was the principal point of honour among soldiers; and the Scots insisted that they were independent of the government of England, and its laws, and that their national assembly had not yet renounced allegiance to King James*. King William immediately communicated this event to both houses of parliament, who readily agreed to give their sanction to punish the insurgents, and on the 3d of April, 1689, passed an act for punishing mutiny and desertion, &c. which was to continue in force till November following, and no longer; it was however renewed again the next January, and has with the interruption of about three years *only*, in the peaceable part of King William's reign, viz. from 10th of April, 1698, to 20th of February, 1701, been annually renewed ever since (with some occasional alterations and amendments) as well in times of peace as of war.

* Dalrymple's Mem. of Great Britain and Ireland, p. 1. p. 264 to 250.

CHAPTER II.

*Of the Power and Authority of Courts Martial,
as at present established.*

MARTIAL law, as formerly exercised, at the discretion of the crown, and often made subservient to bad purposes, justly became obnoxious to the people in general, and not only the propriety, but the legality of its being executed in times of peace, have been absolutely denied by some of the most eminent sages of the law.

It is laid down, says Sir Edward Coke*, That if a lieutenant or other, that hath commission of martial law, doth, in time of peace, hang or otherwise execute any man, by colour of martial law, this is murder, for it is against *Magna Charta*; and Sir Mathew Hale† declares martial law to be

* 3 Institute 52.

† Hale's Hist. of the common law, c. 2.

in reality no law, but something indulged, rather than allowed as a law; that the necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in times of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land; and if a court martial put a man to death in time of peace, the officers are guilty of murder*.

THE exercise of martial law by courts martial, in times of peace, with objections of such weight and authority against it, has, at first sight, the appearance of a proceeding fraught with the most dangerous consequences to those concerned in it; but with all due deference to the opinions of those able lawyers, we will presume to dive a little deeper into this matter.

ONE of the objections against it seems to be founded on the other; that is to say,

† Hale's Pleas of the Crown, p. 46.

it is deemed illegal, because it is contrary to *Magna Charta*; if therefore we can obviate the latter, the former will lose its existence in course. To effect this, it will be necessary to consider the nature of the laws of England, which may be divided into two kinds, viz. *lex non scripta*, the unwritten or common law; and *lex scripta*, the written or statute law.

Lex non scripta, or the common law, which is the most ancient and general law of the realm, is properly the customs of the the kingdom, which by length of time have been generally received, and held as such, before any statute or written law was made to alter them.

Lex scripta, or rather *leges scriptæ*, or the written laws of the kingdom, are statutes, edicts or acts made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled, and are either de-

C

claratory

claratory of the common law, or *remedial* of some defects therein*.

THE statute of *Magna Charta*, which is the oldest now extant, and printed in the statute book, was enacted on a memorable occasion; King John having refused to confirm the laws of Edward the Confessor, who had collected those made by his predecessors the Danes, Saxons, and Mercians, and formed them into one body, known by the name of the Common Law of England, the barons took up arms against him, and obliged him at last to sign *Magna Charta*, which with some alterations and amendments, was afterwards confirmed in parliament by his son Henry III. By this charter the common law was confirmed, and such alterations and amendments made therein as then appeared to be necessary.

By chapter 29th of *Magna Charta*, it is declared that no freeman shall be taken,

* Blackstone's Commentaries, b. 1. p. 85, 86.

imprisoned,

imprisoned or diseased of his freehold or liberties, or free customs; or be outlawed, or exiled, or any otherwise destroyed: and that no sentence shall pass upon him, nor he be condemned, but by lawful judgment of his peers, or by the law of the land; and on this chapter it is that both Coke and Hale appear to have founded their opinions.

BUT at the time of enacting *Magna Charta*, and long after, standing armies were unknown in England; Henry VII. being the first who raised a body of regular troops, called the yeomen of the guard; and even when these authors wrote*, though regular troops had been frequently raised in times of war, and subjected to martial law, yet the keeping them embodied, within the kingdom, in times of peace, and making not only the soldiery, but other subjects of the realm liable to martial law, at the will of the crown, was an illegal extension of the prerogative, exercised by

* They both wrote before the Revolution.

succeeding monarchs, previous to the restoration, and which in the reign of Charles I. alarmed the other branches of the legislature, and occasioned that opposition, which brought about the statute called the *Petition of Rights*,

As future exigencies have arisen in the state, it has become necessary to alter and amend the old laws, and enact new ones; and since the custom of keeping up standing armies, in time of peace as well as war, has become prevalent and general throughout Europe, the legislature of Great Britain has also judged it necessary, for the safety of the kingdom, the defence of its possessions, and the balance of power in Europe (as the preamble to the act for punishing mutiny and desertion, &c. expresses it) to maintain, even in times of peace, a standing body of troops, and authorise the exercise of martial law among them.

A PROPER

A PROPER distinction then should be made between martial law as formerly executed, entirely at the discretion of the crown, and unbounded in its authority, either as to persons or crimes, and martial law, as at present established, being now limited with regard to both. Courts martial are at present held by the same authority as the other courts of judicature of the kingdom, and the king, (or his generals when impowered to appoint them) has the same prerogative of moderating the rigour of law, and pardoning and remitting punishment; but he can no more add to, nor alter the sentence of a court martial, than he can a judgment given in the courts of law. The king has an undoubted right to dismiss an officer or soldier from his service without a trial, but this power cannot bias a court martial, in a matter left to their decision, if men most solemnly sworn to be guided by their consciences, and to administer justice without partiality, favour,

or affection*, can be trusted. Martial law is now exercised within its proper limits, by the advice and concurrence of parliament, whose jurisdiction, says Sir Edward Coke†, is so transcendent and absolute, that it cannot be confined either to causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all denominations, ecclesiastical or temporal, civil, *military*, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within reach of this extraordinary tribunal. It can change and create afresh even the constitution; in short it can do every thing

* Mutiny act, art. 5.

† 4 Institutes 36.

that

that is not naturally impossible; and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of parliament*. The condemnation of criminals by courts martial, acting under such authority, cannot, I should conceive, be regarded as illegal, or contrary to *Magna Charta*; since during the existence of the statute by which they are held, martial law is certainly part of the *lex terræ*, or law of the land. Courts martial still act by particular appointment of the crown, for the king being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatsoever can have any jurisdiction, unless it some way or other derive it from the crown†; but their authority originates from, and they are empowered to punish with death or otherwise, in peace as well as war, within the kingdom, as well as on foreign

* Blackstone's Com. b. 1. p. 161.

† Staunford's Pleas of the Crown; p. 54.

service, by an act of this high tribunal of parliament, made for the same purposes as *Magna Charta* and every other subsequent statute, viz. to alter, amend, and remedy the defects of the common law, and prior statutes, and supercede them by the established maxim in law, that when the common law and statute law differ, the common law gives place to the statute, and an old statute gives place to a new one; this on the general principle that *leges posteriores, priores contrarias abrogant**.

STATUTE laws in general have been found fault with, as being imposed upon the subjects before any probation or trial is made, whether they are beneficial to the nation, or agreeable to the nature of the people, except where they are first made temporary, and for their experienced usefulness, afterwards made perpetual: whereas customs, on which the common law is

* Blackstone's Commentaries, b. 1. p. 89.

founded

founded, bind not till they have been tried and approved of, time out of mind. But this objection cannot hold good against the act for punishing mutiny and desertion, &c. by which martial law and courts martial are now authorised, since it comes within the exception; for the legislature, cautious of entailing a permanent standing army on the British constitution, have admitted of its existence, only from year to year. This act however has been annually passed, with very little interruption, since the Revolution, and is therefore not the work of any particular parliament, but that of successive ones, for near a century, which carries with it a strong indication of its utility.

I MUST acknowledge, with the learned commentator on the laws of England*, (whom I am ever happy to correspond in opinion with) that there is great room for amendment in the present code of laws, for the government of the soldiery, and

* Sir William Blackstone.

could

could wish with him, that this matter was more attended to, upon a future revision of the mutiny bill, but this objection will not hold good with regard to the general tenor of the act. It has been urged against trials by courts martial, as established in the British service, that the prisoner, if a private soldier, has not the privilege of being tried by his peers or equals, since it is enacted, that no member shall be under the degree of a commissioned officer; and the custom observed in many foreign services, of admitting some of the same rank with the prisoner to be members of the court, has been recommended as worthy of imitation. But for my own part, I cannot help doubting, whether, if our present mode of trial wants amendment, the remedy proposed would be efficacious.

Too many among the lower ranks of the soldiery are, I am sorry to say, of very exceptionable characters, owing chiefly to the modern method of recruiting our armies,

mies, by enlisting every one who offers himself, provided he be of a certain make, age, and stature, without paying the least attention to his former character and way of life; and sometimes by even draining the public goals of the kingdom. What justice then can be expected from such wretches, who will scarcely punish others for crimes which, from being daily guilty of themselves, they do not appear to regard as such? and as to the better sort among them, (for it would be the greatest injustice to suppose, that there are not many men in the very lowest ranks of the army of a very different stamp,) I am persuaded, that should it be the fate of any of them to be brought to trial, for any offence against military discipline, they would rather risk the decision of their cause to commissioned officers, with the privilege of challenging such as may be exceptionable to them, (of which I shall speak more fully hereafter) than trust to such men as I have just described, who, as they

they become lost to shame, become lost to honour and veracity, and would punish their fellow soldiers or peers, merely for being better soldiers than themselves. As officers who are members of courts martial are liable to be tried by the same laws, and for the same crimes, their superior rank alone cannot be assigned as a reason for not regarding them as the peers of a soldier: In a trial by a jury in a court of common law, I do not imagine that a prisoner would except against a juror merely because he was in a higher station of life than himself.

BUT, should it be still denied, that a criminal of an inferior rank, brought before a court martial, does not enjoy the privilege of being tried by his peers in its full extent, I make no doubt that it will appear from the sequel, that he has many other advantages which are peculiar to this mode of trial.

COURTS martial cannot sit before eight o'clock in the morning, or after three in the afternoon*, except in cases which require an immediate example; the attendance therefore of the members does not exceed seven hours at a time, and they are at liberty to adjourn from day to day, till they have fully considered the matter before them, and when they come to give their opinions, they are not under the necessity of being unanimous, but the prisoner is condemned or acquitted by a majority of voices, except in cases of death, where nine out of thirteen, or two thirds, if there be more than thirteen present, must concur in opinion†.

No one is under any compulsion, but are all, not only free, but absolutely sworn to judge according to their consciences; and in order to prevent as far as possible, one member being biased by the opinion

* Articles of war, s. 15. a. 9,

† Idem, s. 15. a. 8,

of another, as it seems more likely that the younger officers would adopt that of their superiors, than the elder acquiesce in that of a junior, the youngest member of a court martial, in the same manner as is observed at all debates in the privy council, and by the house of lords at the trial of a peer (where unanimity is not required) gives his opinion first*, † and as it is a part of

* Articles of war, f. 15. a. 7.

† In the French service, the precaution taken to prevent one member from being prejudiced by the opinion of another, is still more certain; the youngest member first inserts his opinion at the top of a sheet of paper, provided for that purpose; then folds down the part on which he has written, in order that those who write after him may not see it. All the others observe the same method, up to the eldest member, by whom the paper is delivered to the president, who unfolds it in order to examine the different sentences, having previously inserted his own, which is considered as two voices if given in favour of the prisoner, but as only one against him. *Cours de la Science Militaire de Bardet de Ville-neuve*, tom. 1. p. 64.

the

the duty of an officer to be a member of a court martial from the time of his being ordered upon this duty, no other service is expected from him, till the dissolution of the court, by proper authority.

FROM hence it is evident that he suffers no inconveniency of body, nor prejudice to his affairs, to induce him to join in a verdict opposite to his real opinion; he is not only left at liberty, but takes a sacred oath to let his conscience be his guide; and by religiously adhering to it, he has the heart-felt satisfaction of never having voluntarily let the guilty go unpunished, or the innocent suffer.

FURTHER, as every particular circumstance given in evidence is minuted down by the judge advocate, the members of a court martial may recur to them as often as they please, for it would be hardly possible to retain every part of it in their memories, particularly in complicated cases, and

and the most minute circumstance will frequently turn the scale for or against the prisoner.

SIR William Blackstone, in speaking of the advantages of a second trial by a jury, observes that, if every verdict was final in the first instance, it would tend to destroy this valuable method of trial. Causes of great importance come often to be tried by a jury, merely upon the general issue, where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surprised by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury; he may not
be

be able so to state and range the evidence, as to lay it clearly before them; nor to take off the artful impressions which have been made on their minds by learned and experienced advocates.

THE jury are to give in their opinions *instanter*; that is, before they separate, eat or drink; and under these circumstances the most intelligent and best-intentioned men may bring in a verdict, which they themselves, upon a cool deliberation, would wish to reverse*.

I CANNOT produce stronger arguments in favour of the mode of proceeding at courts martial, where by adjourning from time to time, and recording the evidence, &c. for the inspection of the members, all the inconveniencies the learned judge has pointed out may be obviated, and a second trial in general rendered unnecessary.

* Blackstone's Comment. b. 3. p. 390.

It may perhaps be alledged, that at a court martial a prisoner is tried by thirteen persons only, and that in a court of law, no man can be found guilty, but by the judgment of, at least, twenty-four, the concurrence of twelve or more*, which form the grand jury, being necessary to find the bill of indictment against him, and the unanimous verdict of twelve more, which compose the petty jury, being requisite to find him guilty. As I would wish to leave no argument unanswered, that there is the least probability of being advanced against the uprightness of courts martial, (as at present established) I will endeavour to shew that this allegation does not carry that weight with it, which may at first be imagined.

As to the advantage gained to a criminal, by the previous examination of a grand jury, it is notorious that many are brought

* The grand jury never consists of less than twelve, and sometimes of twenty-three.

to trial by information ; and even when the matter is previously examined into by a grand jury, as they only hear the evidences on behalf of the prosecution, it very often happens that a man indicted for wilful murder by them, is found guilty of only manslaughter or chance-medley, and sometimes homicide *se defendendo*, or *per infortunium* by the petty jury, before whom he is allowed to produce his own witnesses, and make his defence ; and of other crimes, for which a grand jury may find a bill of indictment, the petty jury will often acquit a prisoner.

ANY one, therefore, against whom a grand jury refuses to find a bill, for want of sufficient evidence, would run but little risk of being found guilty before a petty jury or a court martial, without such previous examination : and as the opinion of a grand jury is not definitive, being rendered invalid, if that of the petty jury differs from it, a criminal is in fact tried by the twelve only, who compose the latter, and whose

sentence he must submit to; for the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party to answer it; and the finding of an indictment is only in the nature of an accusation, which is afterwards to be tried and determined by the petty jury*. As such, the place of a grand jury is supplied by a court of enquiry, which is often held previous to a court martial, where there is a doubt of a sufficiency of cause to bring an offender before that judicature. In fine, a criminal at a court martial is in reality tried by as many, and often more than in a court of law; for though the former is usually composed of a president and twelve members, it is not confined to that number, whereas a petty jury never exceeds twelve†. My intention is by no means to cast reflections upon the mode of trial by jury, that glorious bulwark of English liberty, but,

* Blackstone's Comment. b. 4, p. 300.

† Hale's Hist. Plac. Coronæ, p. 161.

on the contrary, to shew that courts martial, as far as the nature of the case will admit of, adopt this mode; and where they may fall short of the advantages of it in one instance, they endeavour to gain them in another.

It may not be improper here to remark, that although a president and twelve members are sufficient to constitute a legal court, yet it is frequently judged necessary to assemble and swear in more, in order, as far as possible, to guard against accidents, arising from sickness or other causes of the non-attendance of some of them. Courts martial, from not having taken this precaution, and at the same time unaware of the illegality of the measure, have, upon the delinquency of one or more of their members, taken upon themselves to admit new ones during the course of trial, and have then proceeded, as if they had, from the commencement, taken their seats as such; judging it necessary only to read over the evi-

dence already gone through, in his (the new member's) presence; but proceedings of courts martial, thus conducted, can never meet with the approbation or confirmation of his Majesty, or those in authority under him. Whilst there is a quorum of thirteen (the president included) of those originally sworn in, the court may proceed to business, although others who come under this description do not attend; but if it becomes necessary to call in a new member, the court must proceed *de novo*. However, the records of a former court are often admitted, particularly by consent of the contending parties, as evidence on a future one, under certain restrictions and regulations, as was done on the trial of Lord George Sackville, in the year 1760, during which the mutiny act, by the authority whereof the court was held, expired, and another took place; as also on that of Colonel Cosmo Gordon, when the depositions of such witnesses as had given testimony on the trial of Lieutenant-Colonel Thomas, and

and were dead or dispersed, were read and entered as a part of their proceedings.

THE method of trial by twelve men is generally allowed to be very ancient, though writers differ concerning its origin, and the first institution of it in England. It is mentioned by some authors, observes Sir William Temple*, as having been introduced among us by William the Conqueror, but it is evident, continues he, to have been an institution very ancient among the Saxons, and to have been derived and observed during the whole succession of the English kings, and even in the Danish reigns, without interruption; nor are there wanting traces or appearances of it from the very original institution of Odin, the first leader of the Asiatic Goths or Getæ into Europe, and the founder of that mighty kingdom round the Baltic sea, from whence all the Gothic governments in the north-west parts of the

* Temple's Works, v. 4. p. 560.

world were derived, by the spreading conquests of those northern races.

It is true, the terms of *jury* and *verdict* were introduced by the Normans, with many others, in the style and practice of our laws; and trials by twelve men were in use in Normandy before the conquest; but it is most probable that neither the English received it from the Normans, nor the Normans from the English, but that both nations, deriving their origin from those ancient Goths, agreed in several customs or institutions, deduced from their common ancestors.

SOME authors have supposed that we borrowed it, with several other of our customs and laws, from the Grecians, (among whom this number was both famous and sacred) to whom, they were of opinion, the British isles were known long before they were discovered by the Romans.

BUT

BUT whatever may have been the original institution of trials by twelve men, that of obliging them to be unanimous seems to be of a much more modern date; for we find, in the history of Greece*, that Orestes, who was tried for murder in the court of Areopagus†, at Athens, was acquitted by the suffrages for and against him being equal, in which case judgment always passed in favour of the defendant. And among the Romans (who are also supposed to have borrowed the number twelve from the Grecians) the custom was, when the prætor

* Stanyan's Grecian History, v. 2. p. 56.

† This court was called *Areopagus*, because it assembled on a hill not far from the Citadel, called *Arions Pagos*, i. e. Mars'-Hill; Mars having been the first criminal, as some say, who was tried in this court. Their fame was so great, that foreign nations came to them for their decision; and Demosthenes says, that neither plaintiff nor defendant ever went away dissatisfied: they decided all causes in the dark, that seeing neither plaintiff nor defendant, their passions might be uninfluenced.

Universal Hist. b. 1. c. 16. p. 309, 330, 413.

sent

sent out the jury to consult, (*mittebat iudices in concilium*) he delivered to every one three tablets, covered with wax; one of absolution, another of condemnation, and a third of ampliation or adjournment of the trial; the first being marked with A. the second with C. and the third with N. L. or *non liquet*; and then the tablets, being thrown into a proper number of urns or boxes, which were set in the place where the jury withdrew, and taken out by the prætor, he pronounced sentence according to the greatest number.

IN giving sentence, the major part of the judges were required to overthrow the defendant; if the numbers were equally divided, the defendant was actually cleared.*

AND in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the ma-

* Kennet's Antiquities of Rome, p. 130, 147.

jor part ; and in case of an equality, the defendant was held to be acquitted*.

THE necessity of a total unanimity seems then to be peculiar to our own constitution, and even amongst us, it was not necessary anciently (at least in civil causes) that all the twelve should agree ; but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them, as to the reasons of their differing in opinion ; and if, after such examination, both sides persisted in their former opinions, the court commanded both verdicts to be fully and distinctly recorded, and judgment was given, *ex dicto majoribus parte juratorum*†. And according to Bracton and Fleta, if the jurors dissented, sometimes there was added a number equal to the greatest party, and

* Barrington on the Statutes, 17, 18, 19. Steenhook, l. 1. c. 4. Blackstone's Comment. b. 3. p. 376.

† Hale's Hist. Placit. Coronæ. p. 257. note c.

they

they were then to give their verdict by twelve of the old jurors, and the jurors so added* †.

THE crimes that are cognizable by a court martial, as repugnant to military discipline, are pointed out by the mutiny act and articles of war, which every military man is or ought to be fully acquainted with, and therefore not necessary to be recited here; and as to other crimes which officers and soldiers being guilty of, are to be tried for by the ordinary course of law, in like

* Hale's Hist. Common Law, c. 12. p. 258.

† "Contingit etiam multotiens quod juratores in veritate dicenda, sunt sibi contrarii, ita quod in unam concordare non possunt sententiam, quo casu, de concilio curiæ affertietur assissa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor, vel sex, et adjungantur aliis, vel etiam per seipos sine aliis, de veritate discutient et judicent, et per se respondeant, et coram vindictum allocabitur, et tenebitur cum quibus ipsi convenirent.

Bracton, lib. 4. c. 19.

manner

manner with other subjects*, it would be needless to trouble my military readers (for whose use and amusement this treatise is chiefly intended) with a detail of them†. The persons liable to martial law are likewise enumerated therein‡, and therefore a

* Mutiny act, a. 62. Articles of war, f. 11. a. 2.

† In some parts of his majesty's dominions, viz. Gibraltar, &c. where there is no form of civil judicature in force, all persons guilty of capital crimes, or other offences, are to be tried by general courts martial; but as to the officers who may be employed on such trials, I must refer to authors who have wrote fully on the pleas of the crown.

‡ The articles of war mention only officers, soldiers, and persons serving with the armies in the field being subject to martial law; but Hale and other eminent lawyers are of opinion that aliens, who in a hostile manner invade the kingdom, whether their king were at war or at peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but must be dealt with by martial law.--- Hale's Pleas of the Crown, c. 10. 15. 3 Coke's Inst. 11.

1. *Articles of war*, f. 20. a. 2.

further

further exposition of them is equally unnecessary. And the authority of courts martial to take cognizance of such crimes and persons as are under their jurisdiction, having been fully considered, the errors they are in danger of falling into, must arise from their manner of proceeding against offenders; for so exact is the law, even with regard to form, that, says Lord Chief Justice Hale*, “ If a commission of
 “ gaol-delivery issues to A. B. &c. they sit
 “ one day, and forget to adjourn their com-
 “ mission, or the clerk forgets to enter the
 “ adjournment; a felony is committed the
 “ next day, and they proceed in sessions to
 “ take an indictment and give judgment of
 “ death against a malefactor; this judgment
 “ is erroneous, and the clerk of assizes shall
 “ never be permitted to amend the record,
 “ and enter an adjournment, and this judg-
 “ ment being erroneous, shall be reversed;
 “ but it makes not the judges guilty of mur-
 “ der or homicide, though in a strictness

* 1. Hale's Hist. Placit. Cor. p. 498.

“ of law their commission was determined
 “ by the first day’s session, without adjourn-
 “ ment.”

I shall therefore endeavour, in the course of this work, to lay down such rules for the proceedings of military courts, as may prevent my brother officers, when employed on those duties, from acting illegally or improperly, which they are sometimes unknowingly led to do, and are thereby laid open to a prosecution in a court of law*.

FOR

* The judgments of courts martial, besides being open to the disapprobation of the king or his commanders in chief, are liable, like those of other courts, to be taken cognizance of, and the members punished for illegal proceedings; for according to law, the court of King’s Bench, being the highest court of common law, hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of authority against the known, obvious, and common principles of natural justice 1.

1. *Hawkins’s Pleas of the Crown*, b. 2. c. 4. f. 10.

Besides

For this purpose I shall endeavour to
collect

Besides the act for punishing mutiny and desertion directs that every action, bill, plaint or suit against any member or minister of a court martial, in respect to any sentence, shall be brought into some of the courts of record at Westminster, Dublin, &c. and I could enumerate many instances of prosecutions of this nature being brought into Westminster Hall, &c. but let one suffice. In the year 1743, a lieutenant of marines was tried by a court martial on board the Oxford man of war, in Port Royal, in Jamaica, for disobedience of his captain's orders, and condemned to suffer an imprisonment of fifteen years, and rendered for ever incapable of his majesty's service. The evidences brought against him, were the depositions of a parcel of illiterate people, reduced into writing, several days before he was brought to trial, which persons were entirely unknown to him; he having never seen them, nor heard their names before; and upon his objecting to the evidence, he was brow-beat, and loaded with curses and imprecations. For which illegal proceedings, upon his return to England (his sentence being previously remitted by his late majesty) he brought an action in the court of Common Pleas, and had a verdict of

2. *Article 63.*

1000l.

collect every rule and regulation of the courts of law, which may be applicable to courts martial; for although courts martial

1000l. damages given him. It must however be a satisfaction to every officer to know, that if he has the mortification to be prosecuted in a court of law for his proceedings as a member of a court martial, he is not liable to be punished for mere mistakes, which an honest well-meaning man may innocently fall into³; and if the plaintiff or prosecutor becomes non-suited by the verdict of the jury passing with the defendant, he shall recover his treble costs, which he shall have sustained, by reason of his wrongful vexation, in defence of said action or suit⁴. But there is also another tribunal, before which the proceedings of courts martial are liable to *censure at least*. I mean the house of commons, where in the year 1744, it was resolved, (notwithstanding it was warmly opposed by Mr. Pelham, who was at that time first lord of the treasury, and chancellor of the exchequer, and far from an unpopular minister) that the proceedings of a naval court martial, held for enquiring into the conduct of Captain Norris, &c. were *partial, arbitrary, and illegal*. [Debates of the house of commons 18 George II.]

³ *Hawkins's Pleas of the Crown, b. 2. c. 4. f. 10.*

⁴ *Act for punishing mutiny, &c. art. 62.*

E

proceed

proceed by virtue of a particular statute, which like all others was made to supply the defects of the common law, which had no authority to take cognizance of many of the crimes therein mentioned; yet as the method of proceeding against criminals had been long established, the act for punishing officers and soldiers by martial law has only laid down such rules for the proceedings of courts martial, as were intended to differ from the usual methods in the ordinary courts of law. It is therefore natural to suppose, that where the act is silent, it should be understood, that the manner of proceeding at courts martial ought to be regulated by that of the other established courts of judicature of the kingdom.

CHAPTER III.

Of Courts of Enquiry.

COURTS of enquiry have been frequently held in the army, and custom seems to have established them as a necessary part of military jurisdiction, though in whom the power of appointing them is lodged, and what their use and authority are, after their appointment, do not appear ever to have been regularly ascertained. For neither the mutiny act nor the articles of war make the least mention of them. In treating therefore on this subject, I labour under a particular disadvantage; I shall however presume, though with diffidence, to offer my sentiments on the matter, and submit them to the judgment and correction of military readers of greater skill and experience.

IN dubious cases, where better authority cannot be had, we are glad to have recourse to mere precedents for information. This

being my situation with regard to courts of enquiry, I am happy to meet with one of so much consequence, as that which was held, by virtue of a special warrant from his late majesty, to enquire into the failure of the expedition to the coast of France, in the year 1757. As this is the most remarkable court of enquiry that comes within my own knowledge, I shall insert a copy of the warrant, by the authority of which it was held, together with an account of the proceedings of the court, in consequence thereof, and then endeavour from these and other concomitant circumstances, to ascertain some sort of regularity for the conduct of future courts of enquiry.

“ G E O R G E R.

“ WHEREAS we were pleased, in August
“ last, to send a number of our troops on an
“ expedition against France, with orders
“ and instructions to attempt, as far as
“ should be found practicable, a descent
“ upon the French coast, at or near Roch-
“ fort,

“ fort, in order to attack, if practicable,
“ and by a vigorous impressi^on force that
“ place; and to burn and destroy, to the
“ utmost of their power, all docks, maga-
“ zines or arsenals, and shipping, that should
“ be found there, and to exert such other
“ efforts, as should be judged most proper
“ for annoying the enemy, as by our several
“ instructions to the commander of the
“ said forces does more fully appear; and
“ whereas the troops sent for these purposes
“ are returned to Great Britain, no attempt
“ having been made to land on the coast of
“ France; concerning the cause of which
“ failure, we think it necessary that enquiry
“ should be made, by the general officers
“ hereafter mentioned, in order that they
“ may report those causes to us, for our
“ better information. Our will and plea-
“ sure therefore is, and we do hereby no-
“ minate and appoint our right trusty and
“ right intirely beloved cousin and counsel-
“ lor, Charles Duke of Marlborough, lieu-
“ tenant-general; our trusty and well be-

“ loved George Sackville, commonly called
“ Lord George Sackville, and John Walde-
“ grave, major-generals of our forces, to
“ examine and enquire touching the mat-
“ ters aforesaid. And you are to give no-
“ tice to the said general officers, when and
“ where they are to meet, for the said ex-
“ amination; and the said general officers
“ are hereby directed to cause you to sum-
“ mon such persons (whether the generals
“ or other officers employed on the expe-
“ dition, or others) as are necessary to
“ give information, touching the said mat-
“ ters, or as shall be desired by those
“ who were employed on the expedi-
“ tion; and the said general officers are
“ hereby further directed to hear such
“ persons as shall give them information
“ touching the same; and they are autho-
“ rised, impowered and required strictly to
“ examine into the matters before men-
“ tioned, and to report a state thereof as it
“ shall appear to them, together with their
“ opinion thereon. All which you are to
“ transmit

" transmit to our secretary at war, to be by
" him laid before us for our consideration,
" and for so doing, this shall be as well
" to you, as to our said general officers,
" and all others concerned, a sufficient
" warrant.

" Given at our court at Ken-
" sington, this first day of No-
" vember, 1757, in the thirty-
" first year of our reign.

" BARRINGTON."

" To our trusty and well beloved
" Thomas Morgan, Esq; judge
" advocate general of our forces,
" or his deputy."

AGREEABLY to the warrant, the three
general officers therein named, attended by
Sir Charles Gould, the (then deputy) judge
advocate general, assembled, and opened
their business with the examination of several
witnesses and papers, relative to the in-
telligence, on which the expedition was
projected. They next summoned the ge-

nerals, and the other officers, who had been particularly employed during the expedition, in reconnoitring, &c. in order to judge of the practicability of putting his majesty's instructions in execution; and to learn what attempts had been made to execute these instructions, and then called upon Sir John Mordaunt, who was commander in chief of the troops on the expedition, to give his reasons for not having put his majesty's instructions and orders in execution; and lastly they formed an opinion (which they reported to the king) concerning the causes of the failure of the expedition.

FROM hence we deduce, first, that the power of appointing courts of enquiry appears to be vested in the crown; and that it should originate from thence, seems agreeable both to law and equity. For the king, being the supreme magistrate of the kingdom, and entrusted with the whole executive power of the law, no court whatsoever can have any jurisdiction, unless it
some

some way or other derive it from the crown*; besides, as he is considered as the generalissimo, or first in military command within the kingdom, and has the sole power of raising and regulating fleets and armies†, he must possess an indubitable right of taking such methods as he may judge proper, to examine into the conduct of his officers and soldiers, though not authorised to adjudge any man to lose life or limb, or even to receive corporal punishment, unless by the sentence of a court martial. And further, as it is the prerogative of the crown to dismiss officers or soldiers, or any other servants from its service, without any form of trial, so far from objecting to the power of appointing courts of enquiry being lodged with the king, that whenever his majesty shall condescend to leave the examination of doubtful cases to such a court, and take their opinion thereon, previous to the dismissal of the suspected person or persons,

* Staunford's Pleas of the Crown, p. 54. 55.

† Blackstone's Commentaries, b. 3.

or the bringing of them before a court martial, where an offender risks being punished with more severity, it may be regarded rather as a mark of his clemency, and a certain indication of his love of justice and equity.

IF his majesty then is authorised to appoint courts of enquiry, he may also delegate this power by his warrant or instructions to the lord lieutenant of Ireland, or other chief governor or governors there for the time being; or the governor or governors of Gibraltar, and any of his majesty's dominions beyond the seas respectively; or the person or persons there commanding in chief, to hold them in the kingdom of Ireland, and other places and dominions, as he is impowered to do with regard to courts martial*; and for the same reasons it appears justifiable that this power should be extended to the colonels or commanding officers of regiments or corps, to hold regimental

* Mutiny act, a. 2.

courts of enquiry, and to the commanding officers of forts, castles, or barracks, or elsewhere, where the respective corps under their command consist of detachments from different regiments; or if independent companies (as is directed with respect to regimental and garrison courts martial) to assemble garrison courts of enquiry; subjected however to restrictions, somewhat similar to those attending regimental and garrison courts martial*.

SECONDLY, as to the use and authority of courts of enquiry after their appointment, the original and principal intent of them appears to have been, to examine into such cases as admitted of a doubt, whether there was a sufficiency of matter, or evidence against any suspected person or persons, so as to convict him or them before a court martial, and thereby prevent an unnecessary assemblage of that judicature, which is often attended with difficulty,

* Articles of war, f. 15. a. 12, 13, 14.

on account of the number required to form general courts martial, (requisite in all capital cases, and such wherein officers are concerned) whereas courts of enquiry, according to the present custom of the army, consist of a much inferior number of members*; besides courts martial, by a too frequent

* The King of Prussia, with his usual precision in military affairs, has been very particular in his regulations, with rank and number of officers to compose courts martial and courts of enquiry, viz. when the conduct of a field officer is to be examined into, the court of enquiry or examination is to consist of the commandant of the regiment and one field officer; and if he is, in consequence of the examination, to be tried by a court martial, the members to compose it must be a general officer as president, two lieutenants, two majors, and two captains. When a captain is to undergo an examination, one field officer and one captain must be ordered on it; and if tried by a court martial, the members thereof must be a lieutenant-colonel as president, two majors, two captains, two lieutenants, and two ensigns; if his crime be capital, a colonel as president, two lieutenant-colonels, two majors, two captains, three lieutenants and three ensigns. For a court of enquiry

quent use of them, in trivial matters, and such as cannot be supported by evidence

enquiry or examination on a subaltern officer, one captain and one subaltern; for his court martial, a field officer as president, two captains, two lieutenants and two ensigns; and if his crime is capital, a lieutenant-colonel as president, two majors, three captains, three lieutenants, and three ensigns. For the examination of a non-commissioned officer, one lieutenant and one ensign; and for his court martial, one captain as president, two lieutenants, two ensigns, two serjeants and two corporals; if his crime be capital, a field officer as president, three captains, three lieutenants, three ensigns, three serjeants and three corporals. For the examination of a private soldier, an old first lieutenant, and for his court martial, a captain as president, two lieutenants, two ensigns, two serjeants, two corporals, two lance-corporals and two private men; if his crime is capital, a field officer as president, three captains, three lieutenants, three ensigns, three serjeants, three corporals, three lance-corporals and three private soldiers. N. B. When a non-commissioned officer or private soldier undergoes an examination on account of a capital offence, a captain and one non-commissioned officer shall be ordered for it, especially if he has accomplices in his crime.

may

may (as is usual with most things) be by familiarity brought into contempt.

THIS seems to have been the intention of the court of enquiry appointed for examining into the causes of the failure of the expedition to the coast of France; for though the warrant does not authorise the members to enquire particularly into the conduct of any individual, yet as there could be no effect without a cause, if there appeared to have been an improper inaction of the troops, to whom could the cause thereof be imputed with so much propriety as to their commander, to whom the execution of the king's orders and instructions was intrusted. An enquiry, therefore, into the cause of the failure of the expedition, was, by implication, at least, an enquiry into the conduct of the commander; for which reason it appears doubtful, whether the power given by the warrant authorised them to call on Sir John Mordaunt, to give his reasons for
not

not fulfilling his majesty's instructions. For herein consists one of the principal distinctions between a court of enquiry and a court martial; the latter is empowered to hear and examine witnesses on oath, on both sides, to put the prisoner on his defence, and to pass sentence on him, which is definitive, whereas, were a person suspected of any criminal matter, to be previously examined by a court of enquiry, and afterwards brought to trial before a court martial; this examination (as Sir John Mordaunt very justly observed with regard to his own case, when upon his defence before the court martial, by which he was tried, in consequence of the report of the court of enquiry) might in its tendency produce a charge against himself. Many courts of enquiry are ordered only to examine witnesses to the point in question, and not to give an opinion, but to leave it to the person by whose authority they are held, to judge from the facts laid down in the proceedings, whether there is a sufficiency of
cause

cause for bringing the matter to trial by a court martial; and indeed there appears some strong reasons in favour of this mode of proceeding, as the opinion of a court of enquiry might operate forcibly on that to be subsequently given by a court martial. In fine, it seems most adviseable (for the power of courts of enquiry is entirely arbitrary, and not founded on any law, or even invariable custom) either not to call upon the suspected offender, or not to give an opinion; or in case an opinion is given by a court of enquiry, that opinion ought not to point out what were or were not the causes of the supposed ill conduct, which occasioned the sitting of that court, but be simply, *whether there does or does not appear a sufficiency of cause to render a court martial necessary*; for though there may be *matter apparently sufficient* to make a farther investigation on oath proper, it does not follow that the individual or individuals who may be called to answer to an accusation are consequently culpable. No witness at a
court

court of enquiry is sworn as at a court martial, nor is any one obliged *legally* either to give his testimony, or plead before a court of enquiry. The person therefore, whose conduct is to be enquired into, as well as his witnesses, may have many things to plead, and give in evidence before a court martial, which they would not do before a court of enquiry.

COURTS of enquiry may in some measure be regarded in the same light in martial law, as grand juries are in the courts of common law; and the authority of grand juries extends no farther than enquiring upon their oaths, whether there be sufficient cause to call upon the party to answer it; and the finding of an indictment is only in the nature of an accusation, which is afterwards to be tried and determined by the petty jury*, for which reason they only hear and examine the evidences on behalf

* Blackstone's Comment. b. 4. p. 300.

of the prosecution. And no indictor or grand-juror can be put upon a petty jury for the trial of the same cause, if challenged by the prisoner so indicted; nay, if one of the indictors be returned upon the petty jury and does not challenge himself, he is liable to be fined*.

AN extraordinary doctrine, with regard to courts martial, was advanced some years ago by Mr. Pelham, in a debate in the house of commons. He observed, that when an officer, either of the army or navy, was accused of misconduct, or even suspected of any misconduct, the method hitherto had been, for his majesty to appoint a court martial at any time he thought fit, to enquire into such officer's conduct, upon such particular occasion; and when they had made a full enquiry, they either passed such sentence as they thought just, or they reported the whole matter to his majesty, and left to him the determination

* Hale's Hist. Plac. Coronæ, p. 309.

of what punishment he might think the officer deserved. But he seems to have confounded the authority of courts martial with that of the courts of enquiry, which, as is just observed, sometimes give an opinion, and sometimes do not, and yet not to have been very deeply versed in the knowledge of either. Special verdicts are often brought in, upon doubtful points of law arising from jurors, and the determination left to the judges, between whom the law makes this distinction, *De jure respondent judices, de facto jurati*; but such a verdict from the members of a court martial, in whom the characters of judge and juror are united, would be highly absurd.

BUT besides the uses already mentioned, courts of enquiry are often assembled to make surveys of, and examine into the quantity and quality of stores, provisions, cloathing, &c. to settle disputes between officers, as well with regard to points of duty, as in private contentions, where there

is a doubt who is the aggressor; and in short, finally to reconcile all differences that may arise in the course of service, when it can be done without either party being charged with any thing criminal, so as to render a court martial necessary, in order to pass sentence and inflict punishment, to which the power of a court of enquiry does not extend; and courts of enquiry might, I should think, be also made use of for searching into the foundation of complaints of inferior officers or soldiers, who may think themselves wronged by their captains or other officers, for which commanding officers of regiments are required by the articles of war*, to summon regimental courts martial, in order to do justice to the complainant. For as no commissioned officer can be cashiered, or dismissed from the service, except by order from the king, or by the sentence of a general court martial†, if the complaint is

* Section 12. a. 2.

† Sect. 15. a. 15.

found to be just, and of so heinous a nature, that the offender appears to deserve cashiering, this regimental court martial has not power to inflict the punishment adequate to the crime; where then is the use of summoning a court, which cannot do justice to the complainant? Were the circumstances of the complaint to be previously examined into by a court of enquiry, a judgment might be formed from their opinion, whether there was a sufficiency of matter to bring the offender to trial, and a too frequent and unnecessary assembling of courts martial be thereby prevented.

FURTHER, there seems a greater propriety in a court of enquiry taking the inventory of the effects of a deceased officer, than the major of a regiment, or the officer doing the major's duty, being obliged to do it before a regimental court martial, as is the present practice, for he is now under the necessity of exhibiting proofs of his integrity before a court, *purposely* assembled

for the trial of criminals (for the articles of war do not direct that a court martial shall be assembled for this business only, but that it shall be done before the *next* regimental court martial) and which in no other case is authorised to take cognizance of the conduct of *any* commissioned officer, much less of a field officer, who cannot be tried at a general court martial, by any officer under the rank of a captain.

It is much to be wished that courts of enquiry, which are now become an usual (and might be an essential) part of military jurisdiction, were regularly authorised, and their proper business pointed out by the articles of war, or rather by parliament, upon a future revision of the mutiny bill; and were they empowered to administer an oath to their members, and to such witnesses as are called upon to give evidence before them, (which they cannot at present do) it would add to their weight and dignity.

CHAPTER IV.

Of Regimental and Garrison Courts Martial.

REGIMENTAL and garrison courts martial are held by the same authority as general courts martial, but are not intrusted with such extensive powers, their jurisdiction being confined to the cognizance of small offences only, for which they are empowered to inflict corporal and other inferior punishments; a power being invested in every commanding officer of a regiment or garrison to assemble them; and the number of members required to compose them being much less than at general courts martial, they are more easily, and less expensively formed, and are therefore much more frequently held.

WITH regard to general courts martial, the mutiny act and articles of war are very explicit, both as to the number they shall consist of, and the rank of the officers who

are to compose them, it being expressly directed, that no general court martial shall consist of less than thirteen members* †, whereof none are to be under the degree of a commissioned officer; that the president shall not be under the degree of a field officer, unless a field officer cannot be had, in which case the next in seniority to the commander, not being under the degree of a captain, shall preside; and that no field-officer shall be tried by any person under the degree of a captain‡; and it is a general custom not to put subaltern officers (particularly those of but short standing in the army) on general courts martial, provided a sufficiency of field officers and captains can be conveniently assembled.

* Articles of war, f. 15. a. 12.

† In the garrisons of Goree and Senegal, a general court martial may consist of any number, not less than five.

‡ Mutiny act, p. 12. art. of war, f. 15. a. 8, 9.

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THUS provident, I say, have the laws been, concerning general courts martial; but as to garrison and regimental courts martial, the mutiny act is entirely silent, except in authorizing the king to appoint them, and limiting their power and jurisdiction; and although the articles of war direct, that no regimental court-martial shall consist of less than five officers, (except in authorizing the King to appoint them, and limiting their power and jurisdiction; and although the articles of war direct, that no regimental court martial shall consist of less than five officers, (excepting in cases where that number cannot be conveniently assembled, when three may be sufficient) yet they give no sort of instruction, with respect to the choice of officers for this duty.

THE general practice of the army is to appoint a captain (when one is to be had) as president, and four subalterns (or two, if more cannot be conveniently assembled)

as

as members of a regimental court martial, and a regular roster is kept by the adjutant for this, as for other regimental duties; every officer, therefore, will probably, in his turn, be a member of a regimental court martial. By this means, it often happens, that very young officers, who are also very young men*, are ordered on this duty; and who, though possessed of very good natural abilities, improved by a liberal education, have not a sufficient knowledge of the laws of their country, nor experience in military affairs, to direct them in their proceedings, and both I look upon to be essential to a member of a court martial, whether general or regimental; whether authorised to take cognizance of capital crimes, or merely confined to inferior faults and misdemeanours; for though I do not expect that officers of the army should make the deep and intricate distinc-

* By statute 7 and 8 William III. c. 32. infants under 21 years of age may be challenged as jurors.

tions of law a part of their studies, yet it surely must be allowed, that those who not only judges of the guilt of a criminal, but are also to ascertain the mode and measure of his punishment, ought not to be entirely ignorant of the municipal laws of the land, by many of which they must be guided, even in the administration of martial law. Sir William Blackstone strongly recommends, and fully demonstrates the utility of some acquaintance with the laws of their country, to almost every sect and profession, but more particularly to those who intend to profess the civil and ecclesiastical law, in the spiritual and maritime courts, and who would wish to act with safety and prudence as judges; and I should think we may, with great propriety, add those who are to proceed according to martial law in military courts, where they are both judges and jurors, and are to be kept within due bounds by the established laws of the realm.

BUT

BUT to return to regimental and garrison courts martial, in particular. Besides the inconveniences I have already mentioned, they are deprived of the assistance of a judge-advocate, a person judged so essential to a general court martial; it therefore behoves the president (who from his rank may generally be supposed to be an officer of some experience) to direct and advise his members in their proceedings, so as to prevent their deviating from either the martial law, or the fundamental laws of their country; for their decisions are liable to be examined into, in either case; in the first, by an appeal to a general court martial, by either party who may think himself aggrieved; and in the second, for irregular proceedings by a court of law, in like manner with general courts martial.

WHEREVER the law is vague, it opens a vast field for innovation; this being the case with regard to regimental courts martial, commanding officers of regiments have taken

taken great latitude. It has been customary, *occasionally*, to admit the adjutant to sit on regimental courts martial; but this seems contrary to law, equity, and common sense. The adjutant is to a regiment, in many respects, what a sheriff is to a county; he is the person who is to superintend the execution of every judgment, and the inflicting of every punishment; and so cautious has the law been, of not lodging the legislative and executive power in the same hands, that although the sheriff is the principal conservator of the peace in his county, yet, by the express directions of *Magna Charta**, he is forbidden to hold any pleas of the crown, or in other words, to try any criminal offence; for it would be very unbecoming, that the executioners of justice should also be the judges; should one day condemn a man, and personally inflict the assigned punishment the next. Neither may a sheriff act as an ordinary justice of

* Chapter 17.

the peace, during the time of his office*, for this would be equally inconsistent, he being in many respects the servant of the justices. How far these regulations are applicable, with respect to an adjutant, is left to the judgment of my military readers.

THE law says, if an officer, in punishing a criminal, happens to occasion his death, it is only misadventure, for the act of correction was lawful, (provided he does not exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment) but it seems doubtful, should death ensue upon the inflicting of a punishment by an adjutant, who had sat as one of the judges, whether it would be regarded in this light.

THERE is another circumstance relative to regimental courts martial, which also seems worthy of remark; I mean that of

* Statute 1. m. statute 2. c. 8.

holding what are usually called *Field Courts Martial*; that is, assembling a proper number of officers immediately on the spot, who examine into the matter in a summary manner, and pass sentence, which is instantly executed, without any record or register of their proceedings being made. On actual service, where immediate examples are often required, such irregularity (for in such cases it cannot be deemed injustice) may be deemed necessary, *inter arma silent leges*; but this will not hold good in times of profound peace, when the proceedings against offenders will admit of the legal and necessary delays.

Custom may perhaps be urged on this occasion, and in favour of other matters relative to the present mode of proceeding at regimental courts martial, which I have made some animadversions on; but when a custom is even proved to exist, the next enquiry is into the legality of it; for if it is not a good and legal custom, it ought to be

be no longer used, *malum usus abolendum est*, is an established maxim of law*.

IN the course of a debate in the house of commons, on the mutiny bill, in the year 1753, the late Lord Egmont moved, that the members of regimental courts martial, as well as the witnesses called before them, should be sworn, but the motion was overruled; but as they are expected to act upon honour, they are equally bound to proceed with candour, and decide with justice. And as the members of a general court martial are sworn not to divulge the sentence of the court until it shall be approved by his majesty, or those delegated by him; nor disclose the vote or opinion of any particular member of the court, so it also behoves the members of regimental and garrison courts martial to act with secrecy and circumspection.

* Littleton, 212.

THE rules and instructions already laid down, and those which may hereafter be pointed out, for the regulation of courts martial, are chiefly intended for general courts martial; but are applicable in most circumstances to regimental and garrison courts martial, with such distinctions and exceptions, as must be evident to every intelligent reader.

CHAPTER V.

Of Appeals.

HAVING in the former chapter mentioned appeals from regimental to general courts martial, I shall now proceed to consider the nature, as well as the extent of them.

FROM its having been enacted and declared by the 12th clause of the mutiny act, that no officer or soldier being acquitted or

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convicted

convicted of any offence, should be liable to be tried a second time by the same or any other court martial, for the same offence, unless in the case of an *appeal* from a regimental to a general court martial, doubts have arisen with respect to the nature and extent of appeals. To fix their proper bounds is a matter of a very delicate and interesting nature, as well with regard to the soldier, as the service. Should it be understood that appeals are of right due in all cases, much inconvenience might ensue, as conscious offenders would be induced to appeal, merely for the sake of delaying punishment, and would be most apt to do so, when there was either an impracticability or great difficulty of convening a general court martial; and yet on the other hand, it may not be easy, *definitively* to point out in what instances they ought to be allowed or refused. As a matter of legal right, it appears plainly, that an appeal from a regimental to a general court martial is given *only* in the case described in the

2d article of war, of the 12th section, where any inferior officer or soldier, who shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, is to complain thereof to the commanding officer of the regiment, who is authorised to summon a regimental court martial, and from which either party may, if he thinks himself still aggrieved, appeal to a general court martial. For the 12th clause in the mutiny act, whereby it is declared and enacted, that no officer or soldier, being acquitted or convicted of any offence, shall be liable to be tried a second time by the same or any other court martial, for the same offence, unless in the case of an appeal from a regimental to a general court martial, mentions such appeals, only by way of exception, and uses no affirmative enacting words, which can of themselves confer any power or right of appeal, but must have reference to some positive provision, by which such appeal is expressly given; and since there is no men-

tion of an appeal in any other part of the said act, nor among the articles of war in any other than the 2d article of the 12th section, recourse must be had to this, to satisfy the implication of the said clause, and the construction will then be natural, that the appeal of an inferior officer or soldier who shall think himself wronged by his captain, or other officer, &c. is the case there intended.

IN civil process brought into the several courts of law, there is a gradual subordination from one to the other, the superior courts correcting and reforming the errors of the inferior; but as it is contrary to the genius and spirit of the law of England to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial, the criminal courts may be said to be independent of each other; at least so far as that the sentence of the lowest of them can never be controuled or reversed by the highest jurisdiction

dition in the kingdom, unless for error in matter of law, apparent upon the face of the record, though sometimes causes may be removed from one to the other before trial.

THE same caution has been adopted in the military code of laws, as may be seen by the clause of the mutiny act in question; appeals from regimental to general courts martial being the only exception, and these appeals confined to one particular case, which may be considered, in some measure, in the nature of a civil process, and rather calculated for procuring redress to the soldier, than for punishing the officer. For an officer may, through mistake, yet without intention of oppression, do acts whereby a soldier may think himself aggrieved, and against which he may be well warranted in seeking a remedy, and still there may be no ground for proceeding criminally against the officer.

It however must be observed, that even these appeals carry danger with them; for the latter part of the article of war says, "If upon a second hearing, the appeal shall appear to be *vexatious* and *groundless*, the person so appealing shall be punished at the discretion of the general court martial."

THE regimental court martial which is required to be summoned, for doing justice to the complainant, may be truly said to be in the nature of a civil process, for it has not authority to punish either the complaint or the officer complained of; a commissioned officer not being amenable before a regimental court martial: all the justice then that they can do, is to declare their opinion, how well or ill grounded the complaint is; but should either party still think himself aggrieved, and appeal to a general court martial, and the appeal appear to that court martial to be *vexatious* and *groundless*, the person so appealing, whether plaintiff or defendant, is liable to punishment at the discretion

tion of the said general court martial. Here then ceases all analogy to a civil process, and indeed renders the latter part of this article one of the most exceptionable in the whole code.

EVERY thing that can be done in a case of this sort, by a regimental court martial, comes within the cognizance of a court of enquiry; and by the examination before a court, totally divested of every power to inflict punishment, the most distant idea of a second trial for the same offence, so repugnant to the laws of England, and ungrateful to the ear of an Englishman, would be removed.

THE report of the court of enquiry might, like the verdict of a grand jury, be a foundation for bringing either party, who appeared to have acted *criminally*, before a court of criminal jurisdiction.

§ 4 SHOULD

SHOULD a non-commissioned officer or foldier be brought before a regimental court martial, for mutiny, desertion, or any other crime, cognizable only by a general court martial, he may refuse to plead to it, (their jurisdiction being expressly confined to small offences) and insist upon being tried by a general court martial; nay, even should he plead, and the regimental court martial proceed to pass sentence, he may appeal to, and has nevertheless a right to be tried, by a general court martial. For a prisoner, by pleading before an improper judicature, cannot establish, in the court, a jurisdiction which the legislature hath withholden, nor give any sanction to their proceedings; but he may at any time claim, and assert his right of being brought before *that* court, which has the full and proper cognizance of his crime, and so much the rather, as the persons who labour under these circumstances are in general *illiterate* and *unadvised* of the most regular time for taking their exception, nor will the prohibition of a second trial

trial affect this case. For the proceedings of the regimental court martial, as not being founded in law, are totally void, and those of the general court martial become original, without any consideration or retrospect had to the sentence of the regimental court martial. But this may be rather deemed a plea to the jurisdiction of the court, (which shall be more fully explained hereafter) than an appeal.

As the court of king's bench, which is the highest court of common law, takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanour or breach of the peace, and indictments from all inferior courts may be removed into it, by writ of *certiorari*, so may general courts martial judge of all military crimes, from the highest to the lowest; and it may be often expedient to bring causes of an inferior nature, and which are cognizable by a regimental or garrison court martial, before a superior court; but each

below case

case must depend upon its own peculiar circumstances.

IN the latter part of that clause of the mutiny act, which provides against officers and soldiers being liable to be tried a second time by the same or any other court martial, for the same offence, unless in the case of appeal from a regimental to a general court martial, it is enacted, that no sentence given by any court martial, and signed by the president thereof, be liable to be revised more than once; and even the privilege of one revision has been condemned, upon the principle that no man's life should be twice brought in danger for the same supposed crime. But this may be rather deemed an appeal to the same court than a new trial, since the same persons only are to re-consider what they have already done, without any new judges being added to them, or new witnesses produced. Juries are often sent back to re-consider their verdicts. The very best disposed

posed men may occasionally err, and be happy, upon reflection and re-consideration, to correct that error. With such men no risk can be run upon a revision; they cannot be led to swerve from the solemn oath they have taken, to judge *without partiality, favour, or affection*: bad men are as liable to be led away at first as at last. Another reason may be offered in vindication of this sort of appeal or revival; points of law may arise in the course of the proceedings of a court martial, which the judge-advocate, much less the members, may not be adequate judges of, and they may consequently fall into legal errors, which, when pointed out to them, they will joyfully correct. And here I shall take an opportunity of remarking on the distinction made in the oath taken by the president and members of a general court martial, and that of the judge-advocate. The former are sworn, not only to conceal the vote or opinion of each particular member, but also the sentence of the court, until it shall be approved

approved by his Majesty, or by some person duly authorized by him* ; the latter is only sworn not to divulge the opinion of any particular member of the court martial. Should every member be at liberty to reveal the sentence previous to its being approved of, or ordered to be revised, or a judge-advocate take advantage of the omission in his oath, which distinguishes it

* It might be deemed improper to break the thread of my text, in order to offer my sentiments on that part of the oath of a member of a general court martial, which enjoins him to secrecy with respect to the sentence of the court, until it shall be approved by his Majesty, or some person duly authorized by him, having uniformly, throughout this treatise, adhered to the letter of the law, as it stands at present ; but I hope to be excused for expressing (in a note) my feelings for the officers of the army, who are the only subjects of the British empire composing courts of criminal jurisdiction, whose verdicts are indefinite and of no avail, unless approved of by other authority. Naval courts martial, like juries in courts of law, give their opinion *instanter*, and in open court, and that opinion is absolute and conclusive.

from

from the other, it might, in the case of a revival, *in particular*, occasion inferences to be drawn, and jealousies raised of undue influence, as in the instance of a sentence and punishment, which were known publicly to have been the original ones, being altered on a revival, though these alterations may in fact arise merely from a legal error being pointed out to the court. But, as was just now observed, doubts may arise with respect to points of law, which it may be necessary to search into, and regulate, by taking the advice of counsel learned in the law, before the approving officer puts his *fiat* to a sentence. Whom then can he employ with so much propriety on this occasion, as the judge-advocate, whose oath has given him a latitude (which may and should occasionally be made use of) of divulging the opinion of the court, even before it is approved of?

CHAPTER VI.

Of the Duties of a Judge-Advocate.

A JUDGE-ADVOCATE may be said to be the main spring of a court martial, for on him the court depends for information, concerning the legality, as well as regularity of their proceedings; if then *he* errs, all may go wrong. Military men in general, not being supposed to be versed in law, the judge-advocate is directed by the articles of war* to inform; this is (as I humbly conceive is thereby meant) to explain any points of law† that may occur in the course

* Section 15. a. 6.

* It may perhaps appear, at first, a contradiction to say, that a judge-advocate is to explain points of law to the members of a court martial, after having declared, that the articles of war and mutiny act, which are the fundamental laws on which courts martial proceed, are so plain as to be easily understood by military men; but it must be observed, that it is in the method of proceeding, which is in great

course of the proceedings, in order to prevent the members, at the time that they endeavour to act with equity, from proceeding illegally. For although the laws of England most justly may be said to be founded on equity, it must be universally allowed, that they are not so plainly laid down, but that a man with the most equitable intentions may inadvertently swerve from them.

BUT this, though a very essential part of a judge-advocate's business, is not the only one; besides the information the court have a right to expect in points of law from him; he is also to perform the office of clerk or register of the court, as likewise to be prosecutor or counsel for the crown; and it

great measure to be regulated by that of the courts of law, and concerning the greater part of which the mutiny act and articles of war are silent, that members unacquainted with the law are liable to err, and wherein the assistance of a judge-advocate is requisite, which rather confirms than contradicts what I have already asserted,

seems

seems to be generally expected, that he should assist the prisoner in his defence. This last part of his duty (if it really is a part thereof) must have arisen merely from custom, for I know of no authority for it, in either the mutiny act or articles of war; nor is it a part of the instructions usually given from the crown to judge-advocates. Neither can I discover any example of a similar nature in the courts of common law, on which it can be founded: if it takes its rise from the rule, that the judges are always to be of counsel with the prisoner, to see that he has law and justice*, this assistance should rather come from the members of the court martial who are in fact his judges. I would not however be understood to insinuate, that the judge-advocate should totally deny the prisoner his assistance, and thereby take every advantage of the superior knowledge he may be generally supposed to possess, in matters of this

* 3 Instit. 137. Hawkins's Pleas of the Crown, b. 2. c. 30. f. 7.

nature;

nature; particularly on the trials of private soldiers, and such who may endanger their cause, merely from want of ability and knowledge how to defend themselves: should any points of law or doubt arise, the members, as well for their own satisfaction as to do justice to the prisoner, have a right to call upon the judge-advocate for information; neither does it seem incompatible with the other parts of his duty, that he should assist a prisoner (particularly one under the circumstances just mentioned) by pointing out to him the proper mode of supporting his cause and making his defence; but that he shall first prosecute the prisoner, and then, *Proteus-like*, change sides, and furnish him with means and arguments to overthrow those he has before made use of, on the part of the crown, seems inconsistent with justice and common sense. No counsel is allowed to a prisoner, upon trial, for any capital crime, in a court of law, unless some point of law shall arise, proper to

H

be

be debated*; but counsel, or at least *amici curiæ*, have been allowed to prisoners at courts martial, in all cases.

BUT abstracted from this last piece of business, it is evident, from what has been said, that a judge-advocate, in order to do justice to the trust reposed in him, should, besides being thoroughly a master of every particular relative to martial law, be well acquainted with the form of trials in criminal cases, where the king, whose council he is, is always a party concerned, and in a great measure, with the municipal laws of his country.

AND a knowledge of these matters is not the only requisite to form a judge-advocate. Impartiality, which is necessary in every member of a court martial, is peculiarly so in him; he should be particularly careful, not to let one part of his business prejudice him in the conduct of another, nor

* Hawkins's Pleas of the Crown, p. 400.

lead him to endeavour to bias the court, by any ambiguous explanation of the law, or other matters; truth and equity should be most conspicuously seen at all courts martial, but chicanery never permitted to enter the door; his being prosecutor for the crown must not induce him to omit any thing in the records of the court that may be of service to the prisoner; neither is he on the other hand to let his master's cause suffer, and a criminal escape unpunished, through lenity, or any other motive whatever; but in the prosecution, though he should act with spirit and resolution against daring and hardened offenders, yet he ought to be cautious, not to injure or oppress, and much more, not to add insult to severity. In all cases, where misfortune is interwoven with guilt, he should make it appear, that a detestation of the crime, and a regard to the public safety and service, are not inconsistent with pity to the man, particularly to offenders, for the first time; to such whose crimes are small, whose tempta-

tions were powerful, and who appear to have been seduced by others.

IN a court of law, where the king is a party concerned, (as he is in all cases at courts martial) previous to the jury being sworn, he is, by his counsel, to challenge or except against any juror; and it is the business of a judge advocate, as prosecutor for the crown, to do the same at a court martial.

THE nature of challenges I shall consider more particularly in the second part of this work, and only now make a few remarks on an opinion that has been entertained, that a prisoner has not a right to challenge a member of a court martial, without assigning reasons for so doing; and that if those reasons do not appear sufficient to the court, the person so challenged has a right to sit as a member on the trial. An instance of this sort happened on the trial of Lord George Sackville, who excepted against
General

General Belford; and having, by desire of the court, given his reasons for it, they were adjudged to be insufficient, and the general desired to take his place; but he, with great propriety, declined sitting as a member on the trial. I am much at a loss to imagine what gave rise to this method of proceeding; it cannot be founded on authority, for it is diametrically opposite to the practise of all the courts of law in the kingdom*; neither do the articles of war, nor the mutiny act, give any sanction to, or even make the least mention of it, as it could not naturally be supposed, that a court martial would de-

* By the common law of England, though jurors may be challenged, the judges or justices cannot; but in the courts where the proceedings are carried on, according to the civil and canon law, the judges, who like the members of courts martial are also judges of facts, may be challenged. And they commonly, of their own accord, decline sitting as judges in a cause, where they may be supposed to be under the least bias or partiality to one side or the other.
1. Coke's Institutes, fol. 294. 677.-

prive a prisoner of a privilege he is entitled to in every other court.

I HAVE heard it said, that the objecting to an officer, as a member of a court martial, without assigning any cause, is a reflection upon his character as a man of honour, but this notion is founded on a wrong principle. A respectable tradesman, or even a gentleman of rank and fortune in a county, is never regarded in a worse light, for having been challenged without a cause, as a juror. For there are many objections to be made, where life, liberty, and property are at stake, besides his being of ill fame, as will plainly appear, when I come to speak of the causes, which the law allows to be good challenges. I have only therefore to add, that it is certainly an unjust and illegal restriction on a prisoner, and must have proceeded from a bad custom, founded on an erroneous principle, and the sooner it is abolished the better*.

THERE

* Since the publication of the first edition of this treatise,

THERE are indeed some particular crimes, which a prisoner being tried for, in a court of law, is not allowed to challenge peremptorily or without cause, such as high treason or misprision of treason; it being enacted by 33. Hen. VIII. 23. pl. 3. that it should not be allowed in those cases; but by the 1. Philip and Mary 10. such challenges were revived as to treason; however, as neither of these come under the denomination of military crimes, I know of no case, where members of a court martial may not be challenged peremptorily.

IF the right of challenging twenty peremptorily be allowed of, at a court martial, and a prisoner avails himself of it to

treatise, I have met with frequent instances of challenges by prisoners, brought before courts martial, and have always had the satisfaction, upon submitting the matter to the court, whether the prisoner should shew cause, to have a majority in favour of the opinion I have now advanced, and endeavoured to support.

the full extent, many inconveniencies may arise in small garrisons, where there are not a sufficient number of officers to admit of it; and yet to obviate it, I am rather at a loss. For I am very averse to taking away any privilege from a criminal at a court martial, that is enjoyed in any other court. As there is no great probability of such a thing happening, except in the case of some obstinate fellow, who may do it merely to delay his trial, by a proper remonstrance from the judge-advocate, he may perhaps be persuaded to decline his challenges, or at least part of them; but should this not have the desired effect, and there is no opportunity of getting officers from the neighbouring garrisons; in this case, if in any, his challenges might be overruled, without he shews good cause for them; but this arbitrary method of proceeding should be practised with the greatest caution, and not made a precedent, except in the like cases of exigency.

A PROPER

A PROPER regulation of this matter, by authority, is amongst the *desiderata* of military men, with respect to the proceedings of courts martial.

THE administering of the necessary oath to the members being also a part of the judge-advocate's duty, I shall take this opportunity of making my observations on the present method of their being sworn in. In a court of law, the judges are sworn but once, which is on their appointment as such, and on this, it is to be supposed, is founded the custom of swearing the members of a court martial but once, although they try several different prisoners. However, as they supply the place, not only of judges, but also of jurors (who, in a court of law are sworn on every different trial, though the jury consists of exactly the same men) I should think that it would be a more regular and legal method of proceeding, if courts martial were to observe the same. For there is the same reason, that the members

bers should be sworn on every different trial, as the witnesses; and in fact, the form in which the judge-advocate tenders the oath to them, is expressly confined to the singular number in the word *matter*, and formerly* in that of *prisoner* also.

WERE all the prisoners appointed to be tried by a court martial brought into court, and arraigned of their several crimes, previous to the court's being sworn in, for the trial of any particular cause, and upon their being put upon their challenges, made none, or consented to be tried by the same members, and the oath administered by the judge-advocate in the plural, instead of the singular number, it might save both time and trouble, and yet answer the same purpose; but to alter the form of an oath esta-

* "You shall well and truly try and determine according to your evidence in the *matter* now before you."

Mutiny act, sect. 5. Art. of war, s. 15. a. 6.

blished

blished, not only by the crown, but by act of parliament, is a power not vested in any court whatever.

PREVIOUS to a trial, the judge-advocate should collect the witnesses, who are to give evidence on the part of the crown, and also afford intimation to the prisoner of the time appointed for his trial, and furnish him with a true copy* of the crime, or crimes he is accused

* Although it is usual to let the prisoner have an exact copy of the crime or crimes laid to his charge, yet upon the trial of Lieutenant-General (then Major-General) Monkton, for the charge preferred against him by Major Campbell, (of which he was most honourably acquitted) the general, upon hearing the crimes that were exhibited against him, in the king's warrant, observed to the court, that the copy of the charge, which had been given him by the secretary at war, some time before, and against which he had prepared his defence, differed from that now read in court, and therefore begged that the former charge might be read; but the court gave it as their opinion, that the complainant be at liberty to prosecute the charges as stated in his majesty's warrant, to which

accused of; and as the charge exhibited against a prisoner is in the nature of a bill of indictment from a grand jury in a court of law, which is in general very explicit and particular, as to the manner, time, place, &c. in which the crime is said to have been committed, so should the particular instances of misbehaviour, &c. which are intended to be produced against a prisoner at a court martial, be assigned, and fully set forth in the charge, in order that he may provide his witnesses, and prepare his defence. And it would not be improper for the prisoner to give in the names of such persons as he means to call upon as witnesses, in case they are officers, to prevent them, as well as the

which Major-General Monkton must necessarily answer; and that, if in the course of his defence, it should be material for him to shew, either that there was any substantial variation between the present charge, and that originally exhibited, or that the latter indicated any greater degree of malevolence, or for any other purpose, conducive to his defence, it might then be proper to lay the first charge, with his answer to it, before the court.

evidences

evidences for the crown, from being members of the court martial; for although, in a court of law, it seems agreed, that it is no exception against a person's giving evidence for or against the prisoner, that he is one of the judges or jurors who are to try him, as on the trial of one *Hacker*, in the reign of King Charles II*. two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench during the trial, being judged by the court to be good witnesses; and as to the jurors, the present practice, which now universally prevails, is, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court†, but not in private before his brother jurors. Yet, as members of a court martial act in the united capacity of judges and jurors, and the judges

* Keelyng's report of divers cases, p. 12.

† Blackstone's Comment, b. 3. p. 375.

who

who quitted the bench, in order to give evidence, did not return to it during the trial, it might create doubts, whether members, who left their places and became witnesses, could again resume the function of judges in the same cause; but the names of the witnesses on each side being previously given in, would prevent even the shadow of a difficulty.

It may perhaps happen, in the course of a trial, that circumstances will arise which were not expected by one or other of the parties, and render other witnesses necessary, who may be members of the court. It is impossible to guard against unforeseen accidents, but there is the less risk of such happening, by appointing (if possible) such officers for the court martial, as were at some distance; and most probably had no previous connection with, or knowledge of the matter in question, which would also be the most certain method of preventing partiality to one side or the other; but should it so happen, notwithstanding

ing these precautions, that a member of the court is found to be an essential evidence to either party, as the investigation of truth is the principle object of a court martial, it seems most equitable and just, that the practice, with regard to jurors, should, on this occasion *at least*, be adopted in preference of that with respect to judges; and that such member be sworn as a witness, and after giving his testimony in open court, be allowed to assume his former station as a member. In the case of *Hacker*, alluded to above, although two of those in the commission for the trial did not return to the bench, there still remained other judges to pass sentence, which in most cases is positively defined by the law, and not left to the direction of a judge; whereas, by martial law, the mode and manner of punishment to a criminal, is almost as often left to be decided by the members of a court martial, as the determination of his guilt; and therefore, by preventing a member from resuming his place, as such, the parties

parties concerned will be deprived of a vote in both, which will often make an essential difference in a court, where every point is decided by a majority of voices.

CHAPTER VII.

Of the Distinction between Principals and Accessories, and the Means and Method of bringing Offenders to Trial.

THE means and method of bringing offenders, whether principals or accessories, to trial, not being the immediate business of the members of a court martial, though conducive to it, I have judged it more methodical, to treat of these matters here, than to blend them with their proceedings, after the court is appointed and formed; and first of the distinction between the principals in, and accessories to a crime.

HAVING then premised that where a felony is committed by divers persons, the same
man

man may be both principal in, and accessory to it *, as where A. incites B. to commit a crime, and afterwards joins with him in the fact, I shall proceed to shew,

1. When he may be deemed a principal.

2. When an accessory.

It was anciently† the more prevailing opinion, that those only were to be judged principals in felony‡, who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c. and that those in company, who were only present, and abet-

* Hale's Pleas of the Crown, 219. Kellway's Reports, 107.

† Plowden's Comment. 996.

‡ The reader will observe, that I have particularly selected the cases relative to felonies, they being the chief capital crimes that a court martial takes cognizance of, for under that head I rank mutiny, desertion, &c.

ted and encouraged the doing of it, were to be deemed accessories, or at most principals in the second degree only; but according to the present practise, all those who assemble themselves* together with a felonious intent, the execution whereof, causes either the felony intended, or any other, to be committed; or with an intent to commit a trespass†, the execution whereof causes a felony to be committed, and continuing together, abetting one another, till they have actually put their design in execution; and also those, who are present‡ when a felony is committed, and abet the doing of it, as by holding the party whilst another strikes, or by moving him to strike, or delivering§ a weapon to him who strikes, are principals in the highest degree, in respect of such abetment, as much as the per-

* 11 Henry 4. 13. Pl. 30.

† Hale's Pleas of the Crown, 216, 217. Staunforde's Pleas of the Crown, 40. let. D. E.

‡ 2 Institute, 182.

§ Hale's Pleas of the Crown, 216.

son who does the fact, which, in judgment of law, is as much the act of them* all, as if they had all actually done it; and if there were malice† in the abetter and none in the person who struck the party, it will be murder in the abetter, and only man-slaughter in the other.

IN like manner any soldier, who shall persuade another to desert the service, or to commit any other crime, contrary to the military code of laws, will perhaps be found more deserving of punishment than he who actually commits the crime. By the third article of war of the seventh section, any commissioned or non-commissioned officer, commanding a guard, who shall knowingly and willingly suffer any person whatever to go out to fight a duel, shall be punished as a challenger; and all seconds, promoters and carriers of challenges, in order to duels,

* Plowden's Commentaries, 98, 100.

† Hawkins's Pleas of the Crown, b. 1. c. 31. f. 49 to 54.

shall be deemed as principals, and be punished accordingly.

It is sufficient* in general to make an abetter a principal, that the person who does the fact is encouraged and emboldened to it, from the hopes of present and immediate assistance, from the abetter, whether he be within view or not of the fact†.

Those who, by accident, are barely present, and are merely passive, and neither any way encourage it, nor endeavour to hinder it, or apprehend the offenders, shall neither be judged principals nor accessories, yet if they be of full age, they are highly punishable for their negligence, both in not endeavouring to prevent‡ the felony, and in not endeavouring to apprehend the offender:

* Hawkins's Pleas of the Crown, b. 1. c. 29. f. 8.

† Hale's Pleas of the Crown, 216, 217.

‡ Dalton's Country Justice.

and

and if they any way shewed an assent* to the felony, they may be punished as principals in it, because the shewing such assent could not but give encouragement to it. By both the act for punishing mutiny and desertion, &c†. and the articles of war‡, in cases of mutiny, it is made a capital crime, for any officer or soldier, who being present, does not use his utmost endeavours to suppress the same; or coming to the knowledge of any mutiny or intended mutiny, does not, without delay, give information thereof to his commanding officer.

2. In what cases a man is to be deemed an accessory.

It must be observed that the law makes a difference between an accessory before,

* 108. Noy's rep. 537. Staunford's Pleas of the Crown, 217.

† Art. 1.

‡ Sect. 2. art. 4.

and an accessory after the fact. As to those who may be deemed accessories before, it is agreed*, that whoever by hire, command, counsel, or conspiracy, and who by shewing† an express likeing, approbation, or assent to another's felonious designs, abet and encourage him to commit it, but are so far absent‡ when he actually commits it, that he could not be encouraged by the hopes of any immediate help or assistance from them, are all of them accessories before the fact, both to the felony intended, and to all other felonies which shall happen in and by the execution of it, if they do not expressly retract and countermand their encouragement§ before it is actually committed.

If the felony || be the same in substance

* 2 Instit. 180. Hale's Pl. of the Crown, 217.

† Inst. 182. Plowden's Comment. 475. 6.

‡ Staunford's Pl. of the Crown, 40, let. D. E.

§ 3 Inst. 51. Hale's Pl. of the Crown, 217, 218.

|| Plowden's Comment. 4756. 2 Hale's Hist. Pla. cor. 617;

which

which was intended, and varies only in some circumstances, as in respect to the time or place at which, or the means whereby it was committed, the abettor of the intent is altogether as much an accessory as if there had been no variance at all between it and the execution of it; as when a man advises another to kill such a one in the night, and he kills him in the day; or to kill him in the fields, and he kills him in town; or to poison him, and he stabs him: or, if a soldier advises another to desert at one time, and he does it at another; or to betray one gate of a town to the enemy, and he betrays another.

BUT if a man commands or advises another to commit a particular felony, and he commits another*; as to burn the house of A. and he burns that of B. or to steal an ox, and he steals a horse; or one soldier incites another to desert, and he mu-

* Hale's Pl. of the Crown, 217. Plowden's Comment. 475.

tinies, he is not an accessory, because the act done varies in substance from what was commanded or incited.

HE who barely conceals a felony which he knows to be intended, is guilty only of misprision of felony, and shall not be judged an accessory, says Sir William Staunforde*; but by the articles of war, in the case of mutiny, the barely concealing of it is made capital, as was just now observed.

Now, with regard to those cases, wherein a man may be deemed an accessory after the fact: he may be deemed such, by receiving one who was an accessary before, as well as by receiving a principal†. Any assistance‡ whatsoever given to one known

* Pleas of the Crown, 37, letter c.

† Staunforde's Pl. of the Crown, 43. lett. D, Lambard's just. of the peace, b. 2. c. 7. f. 291.

‡ 2 Institute, 183,

to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, will make the receiver an accessory after the fact; as where one assists another with money or victuals, to support him in his escape; or where one harbours or conceals in his house* a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where one harbours in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him. It is however necessary that a man know† of the felony, in order to make him an accessory, by receiving that felon.

ANY person who shall be accessory to desertion, by harbouring, concealing or assisting any deserter from his majesty's service, knowing him to be such, is liable upon conviction, by the oath of one or more credible witnesses, before any of his majesty's

* Hale's Pleas of the Crown, 218.

† Staunforde, 4. let. E.

justices

justices of the peace, to a fine of five pounds, to be levied by distress, and sale of the goods and chattels of the offender; and in case of a default of sufficient goods and chattels, he is to be committed to the common goal, there to remain without bail or main-prize, for the space of three months, or be publicly whipped, at the discretion of the justice*.

IN regard to the trial of accessories, it must be observed, that if one man charged with being a principal is acquitted† of the crime, another charged with having been an accessory to it, shall be discharged; for in law, *ubi factum nullum, ibi fortia nulla*‡.

WITH respect to the means and method of bringing offenders, whether principals or

* Act for punishing mutiny and desertion, art. 55.

† Hale's Pleas of the Crown, 221.

‡ 4 Coke's Rep. 436. Staunforde's Pleas of the Crown, 47. 1st. F.

accessaries,

accessories, to trial; according to the ordinary practice of the courts of law, they must be, first, arrested or apprehended; secondly, imprisoned or discharged, upon bail; thirdly, indicted.*

AND offenders against martial law are to be dealt with nearly in the same manner; for, in the first place, all officers, both military and civil†, are authorised to apprehend them; and secondly, the articles of war‡ direct, that whenever any officer or soldier shall commit a crime deserving punishment, he shall, if an officer be put in arrest by his commanding-officer; if a non-commissioned officer or soldier be imprisoned till he shall be either tried by a court martial, or shall be lawfully discharged by a proper authority; and though the articles of war do not make mention of an offender being admitted to bail, yet a cus-

* Hale's Hist. Plac. Cor. c. 10.

† Act for punishing mutiny, &c. art. 51.

‡ Sect. 15. art. 17.

tom has been long introduced into the army, that when the accusation against an officer is not of a capital nature, he is generally allowed to be in arrest *at large*; that is, to walk about, within certain limits, without a sword: for, as imprisonment, previous to conviction, is only for safe custody, and not for punishment, in this dubious interval, between the commitment and trial, a prisoner ought to be used with the utmost humanity; nor need he be subjected to other hardships than such as are absolutely requisite for the purpose of confinement only, unless where he is unruly, or has attempted an escape*.

THE length of confinement should be considered, as well as the severity of it; and the articles of war† direct, that no confinement shall continue more than eight

* 2 Institute, 381. 3 Institute, 34. Blackstone's Commentaries, v. 4. p. 297.

† Sect. 15. art. 18.

days,

days, or till such time as a court martial can be conveniently assembled. A privation of liberty is of itself far from a trifling punishment, particularly when attended with severity. It ought, therefore, to be made of as short duration, and of as much ease to a prisoner, as possible; for as every man has a right to be supposed innocent, until he is legally convicted, we should do all in our power to avoid the risk of punishing the guiltless.

LASTLY, with regard to indictments, the martial law knows of no such mode of proceeding, unless, as was before observed, the opinion of a court of enquiry may be allowed in some measure to be the same.

The following are the names of the persons who have been appointed to the various positions in the Department of Education, for the year ending June 30, 1908.

Commissioner of Education, John W. Aldrich.
Assistant Commissioner, Charles F. Johnson.
Superintendent of Schools, William A. Smith.
Director of Normal Schools, George H. Brown.
Director of Technical Schools, James M. Smith.
Director of Agricultural Schools, John C. Smith.
Director of Industrial Schools, John C. Smith.
Director of Marine Schools, John C. Smith.
Director of Art Schools, John C. Smith.
Director of Music Schools, John C. Smith.
Director of Physical Education, John C. Smith.
Director of Social Science, John C. Smith.
Director of History, John C. Smith.
Director of Geography, John C. Smith.
Director of English, John C. Smith.
Director of Mathematics, John C. Smith.
Director of Natural Science, John C. Smith.
Director of Languages, John C. Smith.
Director of Literature, John C. Smith.
Director of Philosophy, John C. Smith.
Director of Psychology, John C. Smith.
Director of Sociology, John C. Smith.
Director of Political Science, John C. Smith.
Director of Economics, John C. Smith.
Director of Law, John C. Smith.
Director of Medicine, John C. Smith.
Director of Dentistry, John C. Smith.
Director of Pharmacy, John C. Smith.
Director of Veterinary Medicine, John C. Smith.
Director of Nursing, John C. Smith.
Director of Public Health, John C. Smith.
Director of Sanitation, John C. Smith.
Director of Hygiene, John C. Smith.
Director of Nutrition, John C. Smith.
Director of Exercise, John C. Smith.
Director of Rest, John C. Smith.
Director of Sleep, John C. Smith.
Director of Sex, John C. Smith.
Director of Marriage, John C. Smith.
Director of Divorce, John C. Smith.
Director of Child Welfare, John C. Smith.
Director of Juvenile Delinquency, John C. Smith.
Director of Probation, John C. Smith.
Director of Prison Reform, John C. Smith.
Director of Mental Hygiene, John C. Smith.
Director of Epilepsy, John C. Smith.
Director of Alcoholism, John C. Smith.
Director of Drug Addiction, John C. Smith.
Director of Gambling, John C. Smith.
Director of Prostitution, John C. Smith.
Director of Vagrancy, John C. Smith.
Director of Pauperism, John C. Smith.
Director of Charity, John C. Smith.
Director of Social Work, John C. Smith.
Director of Settlements, John C. Smith.
Director of Neighborhood Centers, John C. Smith.
Director of Youth Clubs, John C. Smith.
Director of Women's Clubs, John C. Smith.
Director of Men's Clubs, John C. Smith.
Director of Children's Clubs, John C. Smith.
Director of Senior Citizens' Clubs, John C. Smith.
Director of Labor Unions, John C. Smith.
Director of Farmers' Organizations, John C. Smith.
Director of Business Associations, John C. Smith.
Director of Professional Societies, John C. Smith.
Director of Religious Organizations, John C. Smith.
Director of Civic Organizations, John C. Smith.
Director of Patriotic Organizations, John C. Smith.
Director of Fraternal Organizations, John C. Smith.
Director of Mutual Aid Societies, John C. Smith.
Director of Insurance Companies, John C. Smith.
Director of Banks, John C. Smith.
Director of Trust Companies, John C. Smith.
Director of Savings Banks, John C. Smith.
Director of Loan Companies, John C. Smith.
Director of Building Societies, John C. Smith.
Director of Real Estate Companies, John C. Smith.
Director of Mortgage Companies, John C. Smith.
Director of Title Insurance Companies, John C. Smith.
Director of Fire Insurance Companies, John C. Smith.
Director of Life Insurance Companies, John C. Smith.
Director of Accident Insurance Companies, John C. Smith.
Director of Marine Insurance Companies, John C. Smith.
Director of Casualty Insurance Companies, John C. Smith.
Director of Reinsurance Companies, John C. Smith.
Director of Brokerage Firms, John C. Smith.
Director of Commodity Traders, John C. Smith.
Director of Futures Traders, John C. Smith.
Director of Options Traders, John C. Smith.
Director of Derivatives Traders, John C. Smith.
Director of Hedge Funds, John C. Smith.
Director of Private Equity Firms, John C. Smith.
Director of Venture Capital Firms, John C. Smith.
Director of Investment Management Firms, John C. Smith.
Director of Pension Fund Managers, John C. Smith.
Director of Endowment Fund Managers, John C. Smith.
Director of Foundation Grant Managers, John C. Smith.
Director of Philanthropic Foundations, John C. Smith.
Director of Charitable Foundations, John C. Smith.
Director of Educational Foundations, John C. Smith.
Director of Research Foundations, John C. Smith.
Director of Policy Studies Institutes, John C. Smith.
Director of Think Tanks, John C. Smith.
Director of Public Policy Research Centers, John C. Smith.
Director of Governmental Research Institutes, John C. Smith.
Director of Congressional Research Service, John C. Smith.
Director of Federal Reserve Bank, John C. Smith.
Director of Federal Reserve System, John C. Smith.
Director of Federal Reserve Board, John C. Smith.
Director of Federal Reserve Open Market Committee, John C. Smith.
Director of Federal Reserve Discount Committee, John C. Smith.
Director of Federal Reserve Advisory Council, John C. Smith.
Director of Federal Reserve Economic Council, John C. Smith.
Director of Federal Reserve Statistical Council, John C. Smith.
Director of Federal Reserve Monetary Council, John C. Smith.
Director of Federal Reserve Fiscal Council, John C. Smith.
Director of Federal Reserve Legal Council, John C. Smith.
Director of Federal Reserve Administrative Council, John C. Smith.
Director of Federal Reserve International Council, John C. Smith.
Director of Federal Reserve Domestic Council, John C. Smith.
Director of Federal Reserve Regional Councils, John C. Smith.
Director of Federal Reserve District Banks, John C. Smith.
Director of Federal Reserve Branches, John C. Smith.
Director of Federal Reserve Correspondent Banks, John C. Smith.
Director of Federal Reserve Member Banks, John C. Smith.
Director of Federal Reserve Non-Member Banks, John C. Smith.
Director of Federal Reserve Foreign Banks, John C. Smith.
Director of Federal Reserve International Banks, John C. Smith.
Director of Federal Reserve Global Banks, John C. Smith.
Director of Federal Reserve Universal Banks, John C. Smith.
Director of Federal Reserve World Banks, John C. Smith.
Director of Federal Reserve Cosmic Banks, John C. Smith.
Director of Federal Reserve Infinite Banks, John C. Smith.
Director of Federal Reserve Eternal Banks, John C. Smith.
Director of Federal Reserve Everlasting Banks, John C. Smith.
Director of Federal Reserve Immortal Banks, John C. Smith.
Director of Federal Reserve Divine Banks, John C. Smith.
Director of Federal Reserve Holy Banks, John C. Smith.
Director of Federal Reserve Blessed Banks, John C. Smith.
Director of Federal Reserve Glorious Banks, John C. Smith.
Director of Federal Reserve Magnificent Banks, John C. Smith.
Director of Federal Reserve Wonderful Banks, John C. Smith.
Director of Federal Reserve Amazing Banks, John C. Smith.
Director of Federal Reserve Incredible Banks, John C. Smith.
Director of Federal Reserve Unbelievable Banks, John C. Smith.
Director of Federal Reserve Impossible Banks, John C. Smith.
Director of Federal Reserve Inconceivable Banks, John C. Smith.
Director of Federal Reserve Intolerable Banks, John C. Smith.
Director of Federal Reserve Unbearable Banks, John C. Smith.
Director of Federal Reserve Insupportable Banks, John C. Smith.
Director of Federal Reserve Unsustainable Banks, John C. Smith.
Director of Federal Reserve Unworkable Banks, John C. Smith.
Director of Federal Reserve Unmanageable Banks, John C. Smith.
Director of Federal Reserve Uncontrollable Banks, John C. Smith.
Director of Federal Reserve Unpredictable Banks, John C. Smith.
Director of Federal Reserve Unstable Banks, John C. Smith.
Director of Federal Reserve Unsafe Banks, John C. Smith.
Director of Federal Reserve Unsound Banks, John C. Smith.
Director of Federal Reserve Unwise Banks, John C. Smith.
Director of Federal Reserve Unjust Banks, John C. Smith.
Director of Federal Reserve Unequal Banks, John C. Smith.
Director of Federal Reserve Unfair Banks, John C. Smith.
Director of Federal Reserve Unethical Banks, John C. Smith.
Director of Federal Reserve Illegal Banks, John C. Smith.
Director of Federal Reserve Immoral Banks, John C. Smith.
Director of Federal Reserve Undeclared Banks, John C. Smith.
Director of Federal Reserve Unlawful Banks, John C. Smith.
Director of Federal Reserve Unauthorized Banks, John C. Smith.
Director of Federal Reserve Unsanctioned Banks, John C. Smith.
Director of Federal Reserve Unapproved Banks, John C. Smith.
Director of Federal Reserve Disallowed Banks, John C. Smith.
Director of Federal Reserve Discontinued Banks, John C. Smith.
Director of Federal Reserve Withdrawn Banks, John C. Smith.
Director of Federal Reserve Revoked Banks, John C. Smith.
Director of Federal Reserve Annulled Banks, John C. Smith.
Director of Federal Reserve Void Banks, John C. Smith.
Director of Federal Reserve Invalid Banks, John C. Smith.
Director of Federal Reserve Inoperative Banks, John C. Smith.
Director of Federal Reserve Ineffectual Banks, John C. Smith.
Director of Federal Reserve Inefficient Banks, John C. Smith.
Director of Federal Reserve Incompetent Banks, John C. Smith.
Director of Federal Reserve Incapable Banks, John C. Smith.
Director of Federal Reserve Inadequate Banks, John C. Smith.
Director of Federal Reserve Inferior Banks, John C. Smith.
Director of Federal Reserve Poor Banks, John C. Smith.
Director of Federal Reserve Substandard Banks, John C. Smith.
Director of Federal Reserve Deficient Banks, John C. Smith.
Director of Federal Reserve Weak Banks, John C. Smith.
Director of Federal Reserve Flimsy Banks, John C. Smith.
Director of Federal Reserve Feeble Banks, John C. Smith.
Director of Federal Reserve Lame Banks, John C. Smith.
Director of Federal Reserve Stagnant Banks, John C. Smith.
Director of Federal Reserve Dead Banks, John C. Smith.
Director of Federal Reserve Lifeless Banks, John C. Smith.
Director of Federal Reserve Barren Banks, John C. Smith.
Director of Federal Reserve Sterile Banks, John C. Smith.
Director of Federal Reserve Infertile Banks, John C. Smith.
Director of Federal Reserve Unproductive Banks, John C. Smith.
Director of Federal Reserve Unprofitable Banks, John C. Smith.
Director of Federal Reserve Unlucrative Banks, John C. Smith.
Director of Federal Reserve Unrewarding Banks, John C. Smith.
Director of Federal Reserve Unfruitful Banks, John C. Smith.
Director of Federal Reserve Unsuccessful Banks, John C. Smith.
Director of Federal Reserve Unfortunate Banks, John C. Smith.
Director of Federal Reserve Unhappy Banks, John C. Smith.
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Director of Federal Reserve Unpleasant Banks, John C. Smith.
Director of Federal Reserve Unagreeable Banks, John C. Smith.
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Director of Federal Reserve Unkind Banks, John C. Smith.
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Director of Federal Reserve Unrelenting Banks, John C. Smith.
Director of Federal Reserve Unyielding Banks, John C. Smith.
Director of Federal Reserve Unflexible Banks, John C. Smith.
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Director of Federal Reserve Unhelpful Banks, John C. Smith.
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Director of Federal Reserve Unbeneficial Banks, John C. Smith.
Director of Federal Reserve Unadvantageous Banks, John C. Smith.
Director of Federal Reserve Unfavorable Banks,

PART II.
Of the MANNER of PROCEEDING against
OFFENDERS.

CHAPTER I.
Of Arraignment and its Incidents.

HAVING in the former part shewn what methods are to be taken to bring an offender against martial law to trial, I shall now endeavour to explain in what manner he is to be proceeded against after his being brought into court; and, first, of his arraignment.

ARRAIGNMENT means the calling the offender to the bar of the court, to answer the matter he is charged with*; and in doing which the law directs†, (and indeed

* Hale's Hist. Pl. Coronæ, c. 28.

† Hawkins's Pl. of the Crown, b. 2. c. 28. f. 1.

common

common compassion points out to us) that every person ought to be used with all the humanity and gentleness, which is consistent with the nature of the thing; and under no terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and therefore ought not to be brought to the bar, in a contumelious manner, though charged with the highest crimes*, as with his hands tied together†, or any mark of ignominy and reproach, nor even with fetters on his feet‡, unless there be some danger of an escape or rescue.

UPON the arraignment of a criminal in a court of law, he is called upon to hold up his hand while the indictment is read to him; but at a court martial this ceremony is not required; nor indeed in a court of

* Hale's H. P. C. c. 28.

† Bracton de legibus et consuetudinibus Angliæ, b. 3. f. 137.

‡ Idem.

law, is it indispensable ; for if the prisoner refuses to hold up his hand, but confesses he is the person named, it is fully sufficient*. The crime of which he stands accused is then distinctly read to him, and the question *guilty or not guilty* put to him by the judge-advocate, when he will either *stand mute*, or *confess* the fact ; which circumstances may be called *incidents* to the arraignment ; or he will plead to the indictment or charge. The several pleas a criminal may make use of shall be treated of in the next chapter ; but first, I shall consider these incidents to the arraignment, viz. *standing mute*, and confession.

1. Of standing mute.

If a man, being put upon his trial, says nothing at all, in cases of felony, the court ought, says Lord Chief Justice Hale†, ex

* Blackstone's Comment. b. 4, c. 25.

† Hale's Hist. Pl. Cor. 317.

officio, to empannel a jury, and swear it, as an inquest of office, to enquire whether he stands mute, *ex visitatione Dei*, (of the act of God) or of malice.

IN like manner, if a prisoner be brought before a court martial, and stands mute, the president and members might be sworn to make the same enquiry.

IF it be found to be of the act of God*, the court † are to enquire whether the prisoner

* 2 Hale's H. P. C. 317. Hawkins's Pl. of the Crown, b. 2, c. 30, f. 7.

† As it is rather uncommon to meet with criminals who stand mute (what the law terms) by the act of God, I shall insert a remarkable instance of one, who may very justly be said to have done so. A deserter from the Prussian service being unexpectedly overtaken by those sent in pursuit of him, whilst he was merry-making with some peasants, the sudden surprize had such an effect on him, that after having made a loud cry, on the first assault, he became quite stupified, and suffered himself to be
led

soner be the same person, and all other matters touching the felony which he might have pleaded in his defence ; for since it is not his fault that he did not plead, there is no reason why his trial should be in a more loose and summary manner, or any way less regular or solemn than if he had. But whether judgment of death can be given against such a prisoner, who hath never

led away, without making the least resistance ; and when he was brought to a trial, could not be prevailed upon, by any means, to speak a single word. He was as immoveable as a statue, and did not appear even to comprehend any thing that was said or done to him. Being afterwards committed to prison, he neither eat, drank, nor slept ; nor had any manner of evacuation. Neither threats, promises nor prayers, could draw an answer from him, but he still remained motionless, as if destitute of all sensation. At last, his irons being knocked off, he was led out, and desired to go where he would but he neither could stir hand nor foot, nor comprehend what was doing to him ; and after spending twenty days in this state, he at last fell down dead,

pleaded, and can say nothing in arrest of judgment, is a point yet undetermined*.

As to a prisoner's standing mute of malice, he may be said to do so, when, upon being arraigned, he makes no answer at all; answers impertinently, or foreign to the purpose, or refuses to put himself upon his trial as the law directs†. But after a man hath confessed himself guilty, or pleaded, and put himself upon his trial‡, he shall not be deemed to have stood mute on account of his subsequent silence; but the trial shall proceed, and the like judgment be given as in common cases.

As to the consequence of standing mute of malice, by the 33. Hen. VIII. 1. 2. it is enacted, that notorious felons, who are openly of ill fame, and will not put themselves in inquests of felonies, shall have strong

* 2 Hale's P. C. 317.

† Hawkins's Pleas of the Crown, b. 2. c. 30. 1. 1.

‡ Hale's P. C. 225.

and

and hard imprisonment, as they who refuse to stand to the common law of the land; but this was not to be understood of such prisoners as were taken upon slight suspicion.

THE judgment of *peine forte et dure*, or strong and hard punishment, as recited by Hale* was, "That he be sent to the prison from whence he came, and put into a dark lower room, and there be laid naked upon the bare ground, upon his back, without any cloths or rushes under him, or to cover him, except his privy parts; his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron as he can bear, and more; and the first day he shall have three morsels of barley bread, without drink; the second day, he shall have three draughts of water, of standing water next the door of the prison, without bread, and this to be his diet till he die.†"

BUT

* Hale's Hist. pl. cor. 219.

† It may seem extraordinary, that any man should

BUT to the credit of the present age, this
severe

subject himself to torture and certain death, rather than put himself upon trial, by which means he might have a possibility, however slight, of escaping punishment; and if he should be convicted, an easy death would be his only suffering: although some few may act thus, *merely* from obstinacy and caprice (an instance of which occurred lately at Kingston assizes) yet the more probable cause in general seems to be a regard to their posterity; their landed property, in case of standing mute, being preserved to them, whereas upon a conviction of felony it becomes forfeited. These circumstances were particularly exemplified in the case of a Mr. Calvery, of a good family in the north of England, who being a man of violent passions, conceived a jealousy against his wife, which, by some unfortunate accident, was turned to such a frantic rage, that early one morning he murdered her, by splitting her skull with his battle-axe, and forced seven children she had by him, to leap off the battlements of his castle, into the moat which surrounded it, where they all stuck fast in the mud, and were suffocated with the slime on the water; he then mounted his horse, and galloped towards a farmer's cottage, where one of his children, an infant at the breast, was at nurse. Whilst upon the road, he was ruminating in gloomy and horrid satisfaction

severe mode of proceeding, from which not even

tisfaction upon the approach of the only matter wanting to the final completion of his zealous revenge, the moon on a sudden was darkened, he lost himself in the midst of a thick forest; the thunder of heaven, which now stunned his ears, seemed to war against him, and summon him to judgment; and the pale lightning, appalling his soul, was to his frantic imagination the fire of hell, preparing punishment intolerable, and tortures excruciating to millions of ages. He stopped, relented, repented; surrendered, and submitted himself to justice. After having made his peace with heaven for the murder of his wife and children, he was agonised by the thought of his having deprived the child thus rescued from his danger, even by the immediate interposition of Providence itself, of the estate and dignity of its ancestors, and of leaving it, instead of its due inheritance, poverty, and the infamy of such a father. He considered, that when convicted, his estate must go to the crown; if he, with his own hand, should anticipate the stroke of justice, it must also become forfeited; he therefore stood mute, upon being arraigned, and submitted with satisfaction to the penalty attending that behaviour, and persevered in bearing the most excruciating pain, with the pati-

even a peer of the realm was exempted, was laid aside by authority, it being enacted by a statute of the 12th Geo. III. ch. 20. that any persons standing mute upon their arraignment for felony or piracy, and not directly answering to such felony or piracy, shall be convicted thereof, and the conviction have all the same consequences in every respect, as if such persons had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

2dly. IN regard to confession; it may be either exprefs or implied.

AN exprefs confession is, when a prisoner directly confesses* the crime he is charged with, which is the strongest conviction that

ence of a proto-martyr, and thereby preserved his estate for the child.

Upon this tragical tale is founded a play called the Yorkshire tragedy, supposed by some to have been written by Shakespear.

* Staunforde's Pleas of the Crown, 142. let. C.

can

can be, and may be received* after the plea of *not guilty* is recorded, notwithstanding the repugnancy.

UPON a plain and simple confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead†; for in cases where life is at stake, the court should be very tender in giving judgment too hastily. And where a person, upon his arraignment, actually confesses himself‡ guilty, or unadvisedly discloses the special matter‡ of the fact, supposing that it doth not amount to felony, whereas it really does, yet the judges, upon probable circumstances that such confession may proceed from fear, menace, or duress; or from

* Keelyng's rep. of div. cases. p. 11.

† Hale's H. P. C. 225. Blackstone's Commentaries, b. 4. p. 324.

‡ 11, Hen. VI, c. 65,

weakness.

weakness or ignorance, may refuse to record such confession, and suffer the person to plead *not guilty*.

AN implied confession is when a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits of it, by yielding to the king's mercy, and desiring to subject himself to a small punishment; in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession or plea, the defendant shall not be estopped* to plead *not guilty* to an action for the same fact, as shall be where he absolutely† pleads guilty.

* 9. Hen. VI. 60. a.

† Idem.

CHAPTER II.

Of the several Pleas a Criminal may make use of.

THE most usual plea upon the arraignment of a prisoner, who neither stands mute, nor confesses, is that of *not guilty*, or *the general issue*, upon which plea alone the prisoner can receive his final judgment of death; and whatever special matter a man may have to offer in his justification, it cannot be put in by way of plea, but he must plead the general issue, *not guilty*, and give this special matter in evidence, which if true, must in effect amount to the general issue, and render the person not guilty, as dearly and effectually, as if it were, or could be specially pleaded*.

BUT there are special pleas, in bar of the charge, which perhaps the prisoner may avail himself of, such as that of *autre fois acquit*; that is to say, that he has already

* Blackstone's Commentaries, b. 4. p. 333.

been

been tried and acquitted of the crime he stands accused of; or that of *autre fois, attaint or convict*; that is, having already been attainted or convicted thereof; which are called pleas, in bar of the (indictment or) charge, and are certainly sufficient pleas to entitle him to be discharged, if he can produce the record* of his acquittal or conviction, or even good evidence to prove it; for a man shall not be brought in danger of his life† for one and the same offence more than once; nor shall an officer or a soldier‡

* The original proceedings of all general courts martial are lodged in the judge-advocate-general's office in London, and any person may obtain an authenticated copy of any particular trial, upon application, and paying the ordinary charges; and the case recited in the text shews the necessity of the original proceedings of all regimental and garrison courts martial being preserved by the proper officers of the respective regiments and garrisons in which they are held.

† Staunford's Pl. of the Crown. 101. let. E.

‡ Act for punishing mutiny and desertion, &c. art. 10.

convicted

convicted or acquitted of *any* offence, be liable to be tried a second time by the same or any other court martial for the same offence, unless in the case of an appeal from a regimental to a general court martial. But the acquittal* of a man as a principal, is no bar to a subsequent prosecution against him, as an accessory after the fact, because such acquittal clears him only of the charge of having committed the fact, which being a crime entirely different from that of receiving him who committed it, there seems no more reason that the acquittal of it should bar a prosecution for the receipt, than if they were offences that bore no manner of relation to one another†. But it is holden in many books‡ of authority, that the acquittal of a man as principal, is a good bar to a subsequent prosecution of him as an

* Hale's P. C. 244.

† Hawkins's P. C. B. 2. c. 35. f. 11.

‡ Staunford's Pleas of the Crown, 44. let. C. 105. let. A. B. Hale's P. C. 244.

accessory

accessory before, for such an accessory is in some measure guilty of the fact, and therefore an acquittal, which clears a man from being guilty of the fact, doth consequently clear him from being such an accessory; yet in some books* it is holden, that a man who hath been acquitted as a principal, may be tried again as an accessory before, as well as after.

It is however agreed, that an acquittal† of a man, as an accessory, either before or after, is no bar to a subsequent prosecution against him as a principal‡.

LASTLY, a pardon may be pleaded in bar, as at once destroying the end and purpose of the indictment or charge, by re-

* Keilword's rep. 107.

† Crompton's just. of peace, 43, 30.

‡ Crompton's just. of peace, 43, Pl. 30. Hawkins's pleas of the crown, b. 2. c. 35. f. 12.

mitting

mitting that punishment, which the prosecution is calculated to inflict*.

WITH regard to these several special pleas in bar, it will be necessary to observe, in general, that although, in civil actions, when a man has his election, what plea in bar to make, he is concluded by that plea, and cannot resort to another, if that be determined against him. Yet in criminal prosecutions, *in favorem vitæ*, when a prisoner's plea in bar is found against him, still he shall not be concluded or convicted thereon, but he may, notwithstanding, plead the general issue, *not guilty*†. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it may be inflicted; viz. on the general issue, after an impartial examination and decision of the facts‡.

* Blackstone's comment. b. 4. p. 331.

† 2 Hale's p. c. 239.

‡ Blackstone's comment. b. 4. p. 332.

THERE

THERE is still another plea, which may be sometimes made use of by a prisoner, viz. a plea to the jurisdiction; that is, where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape, at the sheriff's tourn, or for treason at the quarter sessions; in these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alledged*, and in like manner, if a regimental or garrison court attempt to take cognizance of mutiny or desertion, or any capital crime, their jurisdiction† being expressly confined to small offences; or a general court martial, of which some of the members are under the degree of captains, proceed to the trial of a field officer‡, or the president in any case is under the degree of a captain, an exception may be made to their jurisdiction.

* Blackstone's comment. p. 327.

† Articles of war, f. 15. a. 12.

‡ Act for punishing mutiny, &c. a. 4.

By

By the last* article in the code of military laws, courts martial are authorised to take cognizance of all crimes, *not capital*, and all *disorders and neglects*, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, which are not enumerated in the foregoing articles, and punish them at their discretion; and upon the authority of this article, it has been too much the custom in the army to try soldiers by court martial, for thefts and other crimes, cognizable before the courts of law; although it seems questionable, whether an exception might not, in many cases of this sort, be made to their jurisdiction. For the mutiny act† and articles of war‡ expressly direct, that any officer, non-commissioned officer or soldier, who shall be accused of any capital crime, violence or offence against the person, estate or property of any of his majesty's sub-

* Art. of war, f. 20. a. 3.

† Article 62.

‡ S. 11. a. 1.

jects, which is punishable by the laws of the land, shall be delivered over to the civil magistrate, by the commanding officer, under the penalty of being cashiered in case of his refusal.

THERE was formerly an article (but latterly omitted) that particularly authorised courts martial to take cognizance of all soldiers accused of stealing from their comrades. This is a species of theft (and the only one) that should come before a military court, not only from its tendency to a breach of good order and discipline, but because the plaintiff or prosecutor would, under the like circumstances, be amenable before the same judicature; whereas in those committed by soldiers on citizens, the case is widely different, a court martial having no power over the latter, and therefore cannot put them on such a footing; a court of law then, having equal jurisdiction over both, seems to be the just and legal place of trial for all other thefts, and such like crimes committed by soldiers, against the municipal laws of the land.

CHAP.

CHAPTER III.

Of Challenges.

PREVIOUS to the president and members being sworn, the judge-advocate is to recite to the several prisoners the names of those who are appointed for their judges, in order that they, as well as the judge-advocate himself, as counsel for the crown, may challenge such, (if there be any) as they would except against; for no juror* can be challenged†, either by the king or prisoner, *without consent*, after he hath been sworn, whether on the same day, or on a

* The term juror may be justly applied to a member of a court martial, as well as to a jury-man in a court of law, being derived from the latin verb *juro*, to swear; from hence those sworn on a trial are called jurors. I shall therefore use the word indiscriminately, except where I have occasion to make a distinction between a member of a court martial and a jury-man in a court of law.

† Yelverton's Reports, 25. Coke upon Littleton, 158.

former, on the same trial, unless it be for some cause that happened since he was sworn. Challenges are of two kinds, viz.

1. Without any cause shewn, which are commonly called peremptory challenges.

2. With cause shewn; the nature of each of which I shall consider separately; and

1st. CHALLENGES without cause shewn, or peremptory challenges. By the common law, the king might challenge peremptorily, as many as he thought fit, of any jury returned to try a cause in which he was a party; but this is remedied by 33 Edward I. commonly called an ordinance for inquests, by which it is enacted as follows: "Of in-
"quests to be taken before any of the jus-
"tices, and wherein our lord the king is a
"party, howsoever it be, it is agreed and or-
"dained by the king and all his council,
"that from henceforth, notwithstanding it
"be alledged by them that sue for the king,
"that the jurors of those inquests, or some
"of them, be not indifferent for the king;
"yet

“ yet such inquests shall not remain un-
 “ shaken, for that cause; but if they, that
 “ sue for the king, will challenge any of
 “ those jurors, they shall assign of their chal-
 “ lenges a cause certain, and the truth of
 “ the same challenge shall be enquired into,
 “ according to the custom of the court.”

HOWEVER, if the king challenge a juror, in a court of law, before the pannel is perused*, he need not shew any cause till the whole pannel is gone through, and it appears that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to shew cause, challenges *tous paravaillest*†, yet it hath been adjudged, that the defendant shall be first put to shew all his causes of challenge, before the king need shew any.

* Staunforde's Pl. of the Crown, 162. let. A. State Trials, v. 2. 274. v. 3. 52. 869.

† State Trials, v. 2. 52. Raymond's Reports, 473, 474.

By the common law also, a prisoner tried for felony was allowed to challenge as many as he thought fit, under the number of three full juries, *i. e.* not amounting to more than thirty-five; but by 22. Hen. VIII. 14. Pl. 7. it is enacted, and by 32. H. VIII. 3. made perpetual, that no person arraigned for felony, &c. be admitted to any peremptory challenge, above the number of twenty.

ANCIENTLY, if a prisoner challenged peremptorily above the number allowed, he was to be treated as one who stood mute, or be adjudged to suffer death; but if he challenges above twenty, as the law stands at this day, he shall not have judgment of death, but only his challenge shall be overruled, and the jurors sworn.

2d. CHALLENGES for cause.

HAVING premised that it is a general rule*, that wherever the king is a party (as

* Coke upon Littleton, 158 a. State Trials. v. 3.

he is at all courts martial) he who challenges for cause must shew it presently, and not have time till the pannel is perused, as the king shall, where he takes a challenge; and that after a prisoner hath challenged a juror for cause, and his cause hath been disallowed, or found against him, he may challenge* the same juror peremptorily, before he is sworn. I shall proceed to shew what are allowed by law to be good challenges, when the prisoner challenges for cause.

THERE are many causes for which a juror in a court of law may be challenged, such as want of freehold, non-residence in the country, &c. which cannot happen at a court martial, but I shall confine myself to such as may occur therein.

FIRST, By 25 Edw. III. c. 3. "No in-
"dictor shall be put in inquests, upon the
"deliverance of indictments of felonies, if he
"be challenged for that same cause by him

* 37 Hen. VI. 8. 17.

"who is so indicted." And this exception against a juror, that he hath found an indictment against the party for the same cause, hath been adjudged good, not only on the trial of such indictment, but also upon the trial of another indictment or action, wherein the same matter* is either in question, or seems to be material, though not directly in issue. Members of a court of enquiry (which I have already observed, may in some measure, be compared to a grand-jury) may therefore, by this statute, be challenged and excepted against, as members of a court martial, held either for the same cause, or upon the trial of another action, wherein the same matter is in question or happens to be material, though not directly in issue, as is expressed in the statute, if they have given an opinion, as they are sometimes directed to do. And in cases of appeal from regimental to general courts martial, the same reasons will hold good

* 8 Hen. IV. 2. Pl. 4. Coke upon Littleton, 157. 6.

against

against any member of the former being one of the judges on the latter.

SECONDLY, It hath been adjudged a good cause of challenge on the part of the prisoner, that the juror hath a claim* to the forfeiture which shall be caused by the party's conviction†; or that he hath declared his opinion‡ before hand that the party is guilty, or will be hanged, or the like; but the prisoner shall not examine a juror concerning such matter upon a *voir dire* § (*veritatem dicere*) i. e. oblige him to answer upon oath to such questions as the court shall de-

* State Trials, v. 1. fol. 502.

† An officer, upon conviction, is frequently liable to a forfeiture of his commission, which the next officer for promotion may be said to have a claim to; but whether or not this circumstance should be admitted as a just cause of challenge against such officer, I do not pretend to lay down as law, but only offer it as a quere.

‡ 21 Hen. VII. 29. Pl. 10. State Trials, v. 4. fol. 184, 185.

§ 49 Edw. III. 1. Pl. 2.

mand of him *, because it sounds in reproach. And it hath been adjudged †, that if it shall appear, that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge. Neither is it a good cause of challenge, that the juror hath found others guilty on the same indictment, for the indictment is in judgment of law, several against each defendant, for every one must be convicted by particular evidence against himself.

JURORS may be challenged for suspicion of bias or partiality, which may be either a principal challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it *prima facie*, evident marks of suspicion, either of malice or favour; as, that a juror is of kin to either party within the ninth degree ‡; that he

* Blackstone's Comment. v. 3. p. 332.

† 2 Rolle's Abridg. 657. let. 1.

‡ Finch, 401.

has been arbitrator on either side ; that he has an interest in the cause ; that there is an action depending between him and the party ; that he has taken money for his verdict ; that he has formerly been a juror in the same cause. All these are principal causes of challenge, which, if true, cannot be over-ruled ; for jurors must be *omni exceptione majores*. Challenges to the favour are, where the party hath no principal challenge, but objects only to some probable circumstances of suspicion, as acquaintance and the like*.

THE law also allows infamy to be a good cause of challenge, particularly if the juror hath been convicted of treason, felony, perjury†, &c. but these exceptions cannot well occur at a court martial ; and besides, none of them are principal challenges, (though perhaps allowed by favour, upon

* Blackstone's Comment. v. 3. p. 363.

† Coke upon Littleton, 158 a. Trials per pais, f. 9.

strong presumptive proof) unless the record of conviction be produced or shewn.

THE different parties having gone through their challenges, both peremptorily, and with cause, the court may then be sworn, and proceed to examine the witnesses.

CHAPTER IV.

Of Evidence, and Witnesses.

HAVING premised, that it is a settled rule, that in cases of life no evidence* is to be given against a prisoner, but in his presence, I shall consider,

FIRST, How many witnesses are required in criminal cases.

SECONDLY, What is to be allowed as evidence.

* State Trials, v. 4. f. 277, 310.

THIRDLY,

THIRDLY, Who may be witnesses, and who are exempted from being so.

FOURTHLY, In what manner the witnesses are to give their evidence.

As to the first point, viz. How many witnesses are required in criminal cases. Before the 1. Edward I. no certain number of witnesses were required upon the trial of any criminal whatever*, but by that statute, and the 1. and 2. Philip and Mary 10. two witnesses are required, in cases of treason; and in cases of felony also, it seems to be the present practice in courts of law, as well as at courts martial, to procure two or more witnesses, if they can be had; but when more cannot be found, one positive evidence to facts, and indeed strong presumptive proof, has been often deemed sufficient to condemn a criminal, though he absolutely denies the fact; but then it must be very warily allowed, says

* Keble's Reports, part 3, 68. Pl. 7.

Lord

Lord Chief Justice Hale*; for it is better five guilty persons should escape unpunished, than one innocent person should die. *Tutius semper est errare, in acquietando, quam in puniendo; ex parte misericordiae, quam ex parte justitiae.*

2. WHAT is to be allowed as evidence in criminal cases.

EVIDENCE is of two kinds; either that which is given in proof, or that which a jury may receive by their own knowledge. The former, or proofs, (to which, in common speech the name of evidence is usually confined) are either written or *parol*, that is, by word of mouth. Written proofs or evidence are 1. Records; and 2. Ancient deeds of thirty years standing, which prove themselves; but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of witnesses; and

* Hale's H. P. C. 289, 290.

the general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption, that it would have detected some falsehood that at present is concealed*.

POSITIVE proof is always required, when from the nature of the case it appears, that it might possibly have been had. But next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions* must take place. For when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances, which either *necessarily* or *usually* attend such facts; and these are called *presumptions*, which are only to be re-

* Blackstone's Com. v. 3. p. 368.

lied

lied on, till the contrary be actually proved. *Stabitur presumptioni, donec probitur in contrarium**. Violent presumption is many times equal to full proof, for there those circumstances appear, which necessarily attend the fact; and probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight; but light or rash presumptions have no weight or validity at all†.

THE confession of the defendant himself, whether taken upon an examination‡ before justices of the peace, in pursuance of the 1. and 2. of Philip and Mary 13. or of the 2. and 3. of Philip and Mary 10. or taken by the common law, before a secretary of state, or other magistrates, for treason, felony, or other crimes, not within these statutes; or in discourse with pri-

* Coke upon Littleton, 373.

† Blackstone's Com. v. 3. p. 371.

‡ Hale's Pleas of the Crown, 102, 262.

vate persons*, hath always been allowed to be given in evidence against the party confessing†, but not against others‡; however, it is an established rule, wherever a man's confession§ is made use of against him, it must be all taken together, and not by parcels.

DEPOSITIONS taken by a witness, before a justice of the peace, may, at the pri-

* Dyer's Rep. 215. Pl. 50.

† However averse courts of justice may be from receiving the confession of a prisoner, yet, upon the trial of Lord Audley, for a rape and sodomy, on being shewn his own examination, taken before the lord keeper, lord treasurer, lord marshal and others, subscribed by himself, he declined at first acknowledging it, saying his eyes were bad; but it being read to him, he then acknowledged it, upon which the lord steward (Lord Cooper) advised him not to deny things, which were clearly proved, for then the lords would give less credit to what else he said,

1. *Vide p.* 108.

2. *State Trials*, v. 1. p. 260.

‡ *State Trials*, v. 3. f. 89.

§ *Hawkins's Pl. of the Crown*, b. 2. c. 46. f. 5.

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soner's desire, be read at the trial, in order to take off the credit of the witness, by shewing a variation between such depositions, and the evidence given in court *viva voce*; and for the same reason, where a witness, at one trial, varies from his own evidence at another, in relation to the same matter*; such variance may also be given in evidence to invalidate his testimony at the second trial.

THE examination of an informer, taken upon oath†, and subscribed‡ by him before justices of the peace, upon the commitment for any felony, may be given in evidence at the trial, for the same felony, if it be made by oath, to the satisfaction of the court, that such informer is dead§, or unable to travel||, or kept away by means or

* State Trials, v. 2, f. 343, 528.

† Idem, v. 1. f. 265.

‡ Hale's Pl. of the Crown, 262, 263.

§ Hale's P. C. 262.

|| Keeling's rep. of Divers Causes, 55.

procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the justice, without any alteration whatever, but it is not sufficient to authorize the reading such an examination, to make oath, that the prosecutors have used all their endeavours to find the witness, but cannot find him.

WITH regard to *hearsay* evidence, what a stranger† has been heard to say, is, in strictness, no manner of evidence for or against the prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross examination, and therefore should never be made use of, but only by way of indictment or illustration of what is properly evidence; yet what a prisoner‡ hath been

* Keeling's rep. of Divers Causes, 55.

† State Trials, v. 2. f. 332, 414, 761, 802, v. 3. f. 145, 209.

‡ Idem, v. 3. 254.

heard to say at another time, may be given in evidence, in order either to invalidate or confirm the testimony which he gives in court.

THE comparison of hands is no evidence* of a man's hand-writing, in any criminal case, whether capital or not, except the papers are found in the custody of the person ; but where in the custody of another it is no evidence ; yet, undoubtedly, the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury†.

IT is evident, from what has been said, how averse the courts of law are, to admitting of depositions or other written papers, or hearsay, as evidence, when *viva voce* witnesses can be procured ; and it be-

* State Trials, v. 3. f. 892.

† Blackstone's Com. v. 4. p. 352.

hoves courts martial to be equally cautious; but their jurisdiction being limited to military persons, they have no authority to summon any others as witnesses; whereas, in a court of law, there is a process to bring them in, by writ of sub-pœna; and from this want of power in courts martial, they are often obliged to give greater latitude to such sort of evidence; however, their credibility is left to the court.

WORDS are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use; and where words are clearly repugnant in two laws, the latter takes place of the former, upon the maxim, *leges posteriores, priores contrarias abrogant**.

WHATEVER is given in evidence must be

* Blackstone's Comment. v. 1. p. 59.

to the very fact or point in issue, either on one side or other; and no evidence ought to be allowed of to any other point, nor should collateral matter of any sort be admitted, unless conducive or introductory to the main point.

As to such evidence as jurors may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment, as the written or parol evidence which is delivered in court. And therefore it hath been often held, that though no proofs be produced on either side, yet they might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed to be, to do it according to the best of their own knowledge. But this doctrine was gradually exploded, and the practice which now universally prevails is, that if a juror knows any thing of the matter in issue, he may be sworn

sworn as a witness, and give his evidence publicly in court*.

3. WHO may be witnesses in criminal cases, and who are exempted from being so.

ALL witnesses, who have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are interested in the event of the cause. All others are *competent* witnesses; though the jurors, from other circumstances, will judge of their credibility. Interested persons may be examined upon a *voir-dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court, which last is the only method of supporting an objection to such as are *infamous*; for no man is to be examined to prove his own infamy†.

* Blackstone's Commentaries, v. 3. p. 374.

† Blackstone's comment. v. 3. p. 370.

BUT to be more particular, a husband and wife being as one and the same person in affection and interest* can no more give evidence for one another in any case whatsoever, than for themselves, as they would contradict the maxim in law, that *Nemo in propria causa testis esse debet*; and regularly the one shall not be admitted to give evidence against the other, by reason of the implacable dissention which might be caused by it, and the great danger of perjury, from taking the oaths of persons, under so great a bias, and the extreme hardship of the case; and it would contradict another maxim, *Nemo tenetur seipsum accusare*; yet some exceptions have been allowed† to this general rule, in cases of evident necessity. But the exception against kindred in general, though a good cause of challenge

* Coke upon Littleton, 66. 2. Rolle's abridgement, 686. pl. 4.

† It was allowed in the case of Lord Audley, who held his wife, whilst his own servant, by his order, ravished her. State Trials, v. 1. f. 265, 269.
against

against a juror, is not so against a witness*, therefore the father may be a competent witness for or against his son, or *e'converso*; or the master for his servant, or *e'converso*; these or the like exceptions may be made to the credit or credibility of the witness, but are not exceptions against his competency; and it may be observed once for all, that the exceptions to a witness are of two kinds.

1. EXCEPTIONS may be made to the credit of the witness, which do not disable him from being sworn, but yet may blemish the credibility of his testimony. In such a case the witness is to be allowed, but the credit of his testimony is left to the jurors, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness, and his testimony; and these exceptions are of so great variety and multiplicity, that they cannot be reduced under rules or instances.

* 2 Hale's H. P. C. 276.

2. EXCEPTIONS

2. EXCEPTIONS may be made to the competency of the witness, which exclude him from giving his testimony, and of these exceptions the court is to be the judge.

A CONVICTION of treason*, felony†, piracy‡, premunire§, perjury¶, or of forgery on the 5th of Elizabeth||; also a judgment** in attain for giving a false verdict, or in a conspiracy at the suit of the king††, and also judgment ‡‡ for any crime whatever, to stand in the pillory, or to be whipt§§ or branded, being

* Modern Rep. 16.

† Raymond's Rep. 148.

‡ Rolle's Abridgment, 686.

§ Coke upon Littleton, 66.

¶ Idem.

|| Hen. VI. 55. Pl. 45.

** Coke upon Littleton, 66.

†† 33 Hen. 6. 55. Pl. 45.

‡‡ Salkeld's Rep. 689.

§§ Whipping is a punishment never adjudged in the common law courts, except for crimes that carry infamy

being in a court which had a jurisdiction*, are good causes of exception against a witness, while they continue in force, but no such† conviction or judgment can be made use of, unless the record be actually produced in court; and it is a general rule that a witness shall not be asked† any question,

infamy along with them, and therefore render the sufferer an incompetent witness; but the necessity of supporting military discipline often makes this punishment necessary to be inflicted on soldiers, for misdemeanours and other small crimes, which cannot be termed infamous, and therefore should not render them incompetent witnesses, though they may perhaps appear to be incredible ones. For although judgment of the pillory infers infamy at common law, by the civil and canon law it is no infamy, unless the cause for which the person was convicted was infamous, and it hath been adjudged, that tis not the standing in the pillory, disables a person to give evidence, but the standing there for some infamous crime, as forgery, &c. If for a libel, a man may be a witness, and so in other cases, when he is pardoned. 5. Mod. 16. 74.

* Synderfin's rep. 51. Pl. 16.

† State Trials, v. 1. f. 268.

the

the answering to which might oblige him to accuse himself of a crime, and that his credit is to be impeached* only by general accounts of his character and reputation, and by proofs of particular crimes, of which he never was convicted.

OUTLAWRY† in a personal action is not a good exception against a witness. And a person convicted of felony, who is admitted to his clergy, and burnt in the hand‡ is thereby re-enabled to be a witness.

THE King's pardon§ of treason or felony, after a conviction or attainder, restores the party to his credit; and Lord Chief Justice Holt¶ is of opinion, that the king's pardon will remove a man's disability to be a wit-

* Idem. v. 3 f. 256. 680.

† Coke upon Littleton, 6. b.

‡ Hawkins's P. C. b. 2. c. 39. f. 129.

§ Idem. b. 2. c. 37. f. 47, 48, 49.

¶ Salkeld's rep. 514. 689.

ness,

ness, in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment, as it is in conspiracy, at the suit of the king: and Sir Matthew Hale* thinks that one convicted of conspiracy, perjury, or forgery, may be a good witness, if pardoned.

IN all cases whatsoever, it is a good exception against a witness, that he is to be either a gainer or a loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. And yet it appears from daily experience, that a person beaten†, and generally any other person to whose damage‡ a criminal information concludes, is a good evidence in a court of law, to prove such battery or other misdemeanour, notwithstanding the

* Hale's Hist. Pl. Cor. 306.

† 2 Rolle's Abridg. 685. Pl. 5.

‡ Syderfin's rep. 237. Pl. 5.

objection

objection that he may have an action: and in courts martial inferior officers are admitted as evidences against a superior, by the conviction of whom they are likely to gain promotion.

IN some cases, although a consequential benefit to a witness doth not disable him from giving his testimony, yet it may abate the credit of it*.

It is no good exception against a witness that he has maintenance from the king, for every man may maintain his own witnesses; neither is it a good exception against a witness, that he hath received a reward for having made a discovery of the crime to be proved against the prisoner; nor that a witness hath the promise of a pardon, or other reward, on condition of giving his evidence, unless such reward be promised by way of contract, for giving such and such

* Hale's H. P. C. 280.

particular evidence, or full evidence, or any way in the least to bias him to go beyond the truth.

It is allowed to be a good exception, that the witness believes neither the Old nor New Testament to be the word of God*, on one of which our laws require that the oath should be administered; yet a Mahometan sworn upon the 'koran has been admitted as an evidence†; for if a murder or other crime is committed in the presence of a Turk only, who owns not the Christian religion, it would be very hard that the criminal should go unpunished, because such an oath must not be taken; but the credit of such testimony must be left to the jurors.

As to whether an accomplice, in the crime charged against the prisoner, may be

* Trials per pais, v. 2. f. 334, 693. 2 Keble's rep. 314. Pl. 23.

† Hale's Hist. Pl. Cor. 279.

a witness

a witness for or against him, it has been long settled*, that it is no exception against a witness that he hath confessed himself guilty of the same crime, if he hath not been indicted† for it; for if no accomplices were to be admitted as witnesses, it would generally be impossible to find evidence to convict the greatest offenders.

AND it hath been often over-ruled‡, that accomplices, who are indicted, are good witnesses for the king, until they are convicted.

IT hath also been adjudged§, that such of the defendants, in an information, against whom no evidence is given, may be witnesses for the others; and that where|| A. B.

* State Trials, v. 1. f. 253.

† Idem, f. 723.

‡ Idem, v. 1. f. 966. 3 Keble's rep. 136. Pl. 70.

§ Syderfin's rep. 237. Pl. 4.

|| Roll's Abridgment, 685. Pl. 3.

and

and C are sued in their several actions, on the statute, for a supposed perjury in their evidence, concerning the same thing, they may be good witnesses in such action for another.

WANT of discretion* is a good exception against a witness; on which account alone an infant† may be excepted against, for in some cases, an infant of nine years of age has been allowed to give evidence; nay, in cases of rapes, charged to be committed upon infants, those of a much earlier age are allowed to be heard, without oath, to give the court information, though *that* alone is not sufficient to convict the offender, without there be concurrent circumstances to corroborate it, proved by other witnesses‡. But it is no objection against

* Coke upon Littleton, 6.

† Hale's P. C. 263.

‡ Idem, 634.

N

a witness

a witness that he is an alien, or villein, or bondsman*, &c.

SOME are disabled from being witnesses, in regard of defect of intellectuals: a person of non-sane memory cannot be a witness while he is under that insanity; but if he has *lucida intervalla*, (lucid intervals) then during the time he hath understanding he may be a witness, but it is a difficulty scarcely to be cleared, what is the *minimum, quod sic* disables the party†.

No counsel, attorney, or other person, intrusted with the secrets of the cause by the party itself, shall be compelled, or perhaps allowed, to give evidence of such conversation, or matters of privacy, as came to his knowledge, by virtue of such trust or confidence‡; but not only an attorney-ge-

* State Trials, v, 1. f. 253.

† Hale's H. P. C. 278.

‡ Law of Nisi Prius, 267. Blackstone's Com. v. 3. p. 370.

neral, but any other counsel or attorney, and consequently the judge-advocate at a general court martial, may be examined as a witness for either party, as to mere matters of fact*, and an attorney-general or judge-advocate may be compelled to give evidence in favour of a criminal, though under prosecution by himself, should he be called upon by such criminal. And as the judge-advocate, besides being prosecutor on the part of the crown, is also clerk or register of the court, he may also be called upon to produce the records or proceedings of a former court, and to prove upon oath the authenticity of such records or proceedings. And in all cases where a judge-advocate is called upon as a witness, the oath as such may be administered to him by the president of the court; and after giving his testimony, he is to re-assume the other functions of his office. Lastly, among those who

* Laws of Nisi Prius, 267. Blackstone's Com. v. 3. p. 370.

are allowed by law to be good witnesses, it is necessary to mention the judges and jurors; but as inconveniencies or *doubts at least* may arise, upon members of a court martial, who act in the united capacity of judge and juror, being called upon as such, I have already endeavoured* to point out how either or both may in most cases be avoided.

4. IN what manner the witnesses are to give their evidence.

It must be premised that the oath administered to a witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth, so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.

AND witnesses in giving their testimony must relate the very fact that the prisoner

* Vide part 1.

† Blackstone's Com. v. 3. p. 372.

did, or the very words that he made use of, for it is no evidence* in any criminal case, that the defendant did so and so, or said so and so, or words to the like effect, because the court must know the very act or words, to judge of their force and effect.

No witness is allowed to read any evidence he may have prepared in writing, but he may recur to notes to refresh his memory.

BEFORE the reign of Queen Anne, it had been a constant immemorial† practice not to suffer witnesses to be sworn against the king, on trials of capital crimes, except in some cases specially provided for by statute; though those for the king were in all cases sworn; however it is enacted by 1. Anne, 9. Pl. 3. that, "after the 12th of February,

* Hobart's Reports, 294.

† State Trials, v. 1. f. 55. 148. v. 2. f. 296. 737.
Hale's Pl. C. 264.

“ 1702, every person who shall be pro-
“ duced, or appear as a witness on the be-
“ half of the prisoner, before he or she be
“ admitted to depose or give any manner
“ of evidence, shall first take an oath to
“ depose the truth, the whole truth, and
“ nothing but the truth, in such manner as
“ the witnesses for the queen are by law
“ obliged to do; and if convicted of any
“ wilful perjury in such evidence, shall suf-
“ fer all the punishments, penalties, forfei-
“ tures, and disabilities, which by any of
“ the laws and statutes of this realm are or
“ may be inflicted upon persons convicted
“ of wilful and corrupt perjury.” And the
act for punishing mutiny and desertion, &c.
directs that a general court martial shall ad-
minister an oath to every witness*.

· If a witness be produced and sworn for
the king, yet if that witness alledge any
matter in his evidence that is for the pri-

* Article 4.

soner's advantage, (as many times they do) that stands as a testimony upon oath for the prisoner, as well as for the king*.

A PEER, sitting in judgment in the house of lords, gives not his verdict upon oath, like an ordinary jury-man, but upon his honour†; but when he is examined as a witness, either in civil or criminal cases, he must be sworn; for the respect which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim that, *in judices non creditur, nisi juratis*‡.

ALL witnesses, either for the king or the prisoner, must be sworn, and give their evidence in presence of the whole court§,
of

* Hale's Hist. Placit Cor. 283.

† Salkeld's Reports, 512.

‡ Cro. Car. 64.

§ On a late general court martial, two material witnesses being sick, and unable to attend the court, in order to give their evidence, *six* of the members

of the parties concerned, and all bystanders, each party having liberty to except to its competency, which exceptions are to be publicly stated, and openly and publicly allowed or disallowed by the court. This open examination of witnesses is much more conducive to the clearing up of truth*, than a private one; for a witness may frequently depose in private, that which he will be ashamed to testify before a public and solemn tribunal; besides, by this method of examination, all those who are to decide upon the evidence have an opportunity of observing the quality, age, education, un-

were deputed to take it, at their own apartments, and report it to the court; for which irregularity, his Majesty thought proper to disapprove of their proceedings; however, if material witnesses, either for the king or prisoner, are unable to attend, thro' sickness or other satisfactory causes, the *whole* court may adjourn to the sick (or other) persons' houses, and there receive their evidence, the prisoner being present, and having an opportunity to cross-examine them.

* Hale's Hist. of the Common Law, 254.

derstanding,

derstanding, behaviour, and inclinations of the witness, in which points all persons appear alike, when their depositions are reduced to writing; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it*.

IN the examination of the witnesses, those in support of the charge are first to give their testimony, and then, the prisoner being put on his defence, is at liberty to produce what witnesses he can, to confirm on oath what he himself affirms. The members of the court, the judge-advocate or prosecutor, and the prisoner, have equally a right to question and cross-question the several witnesses, whether produced on one side or the other; and either of the parties may insist on the rest of the witnesses being out of court, while any one is under examination; however it sometimes becomes

† Blackstone's Comment. v. 3. p. 373.

necessary

necessary to confront adverse witnesses, who diametrically and absolutely contradict one another, in their relations of the same fact or facts.

THE evidence on both sides being heard, and the prisoner having made his defence, the prosecutor has a right, in case he finds it necessary, to make a reply. By a reply is to be understood, a right of observing upon the evidence in general, which cannot be done until it has been heard on both sides, and also a right of controverting by evidence any *new* matter introduced by the prisoner in his defence; and as courts martial are inclined to grant every reasonable indulgence to a prisoner, he is generally permitted upon application to give in his answer to the prosecutor's reply, which is termed a rejoinder; but this is rather a matter of special favour than of right; for he has already had his opportunity of stating the evidence on both sides, and can have no new matter to controvert, because
the,

the prosecutor is by no means at liberty to produce any in his reply.

CHAPTER V.

Of giving a Verdict or Opinion, and passing Sentence.

THE court having gone through the examination of the witnesses produced by the different parties, as well as the reply and rejoinder (if there be any) are now to perform the most serious part of their business, which is, giving their opinion whether the prisoner be *guilty* or *not guilty* of the crime he stands accused of; and if found *guilty*, passing sentence on him; previous to which it is necessary that all and every member should be perfectly informed of the matter in question, and in order to obtain this information, it should be fully debated amongst themselves, and the judge-advocate should make it his business to elucidate and explain whatever may be doubtful

or

or intricate. There are also some points in regard to guilt in general, which ought to be considered before they finally give their opinion.

IN the first place, the guilt of offending against any known law whatever, necessarily supposing a wilful disobedience, can never justly be imputed to those, who are either incapable of understanding it, or conforming themselves to it; and therefore cannot apply to * those who are under a natural disability of distinguishing good from evil, such as infants, under the age of discretion, idiots and lunatics, who are not chargeable for their own acts, if committed under these incapacities; for it is observed by Sir Edward Coke, that the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat* †. Nay further, if any one ‡ who has committed a capital crime, became *non*

* Hawkins's Pl. of the Crown b. 1 c. 1.

† 3 Institutes 6.

‡ Hales's Pl. of the Crown, 10. 43. 65. 3 Inst. 4. 6.

compos before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.

BUT he who is guilty of any crime whatever, through his voluntary drunkenness*, shall be punished for it, as if he had been sober; for drunkenness is rather an aggravation, than an excuse for criminal behaviour.

ALSO he who incites a madman to commit a crime, is a principal offender†, and as much punishable as if he had done it himself.

A MAN that is urged to do what his judgment disapproves, and what it is presumed his will (if left to himself) would reject, may plead this in exculpation of himself.

* Coke upon Littleton, 247.

† Hales's Pl. of the Crown, 43. 44. Dalton's Justice ch. 95.

IGNORANCE of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, does not excuse any, who are of the age of discretion and *compos mentis*, from the penalty of the breach of it, because every person of the age of discretion and *compos mentis*, is bound to know the law, and presumed so to do *. It never therefore can be any excuse for a prisoner at a court martial to plead ignorance of the martial law, which is contained in so small a compass, and is repeated every two months at the head of every regiment, troop, and company†.

BUT in some cases *ignorantia facti*, (as the law terms it) or ignorance of the fact, doth excuse, because such ignorance many times makes the act itself morally involuntary; for if that act which is committed be simply casual and *per infortunium*, regularly that act, which were it done *ex animi intentione*,

* Hales's Hist. Plac. Cor. 42.

† Articles of War, s. 20. a. 1.

were

were punishable with death, is not by the laws of England to undergo that punishment; for it is the will and intention that regularly is required, as well as the act and event, to make the offence capital. For instance, it is known in war, says Sir Matthew Hale *, that it is the greatest offence for a soldier to kill, or so much as assault his general; suppose then the inferior officer sets his watch or centinels, and the general, to try the vigilance or courage of his centinels, comes upon them in the night, in the posture of an enemy (as some commanders have too rashly done) if the centinel strikes or shoots him, taking him to be an enemy, his ignorance of the person excuseth this offence.

THE crimes which are cognizable before a court martial may be divided into felonies and misdemeanours, or more properly into capital offences, and offences only criminal,

* Hales's Hist Placit. Coronæ, 25.

and

and not in their nature capital; and if a prisoner, after having gone through the evidence, does not appear to be guilty of a crime of so capital a nature, as was set forth in the charge, yet the court may find him guilty in a less degree, if I may so term it, but not a quite different sort of crime or misdemeanour. As for instance, a soldier tried for desertion may be found only guilty of absenting himself without leave. The act and deed is the same, but the intentions that accompany it, which must be judged of from circumstances, are what constitute the crime, and not the length of time that he is absent or the distance to which he escapes. Many a man flies from his colours, but for a short time, and yet gives evident proofs of his being a deserter in every sense of the word, whilst another, poor wretch! may absent himself much longer, through drunkenness, fear of punishment for some other offence committed, &c. and yet manifest no intention of totally abandoning the service. In such case, I say, a court martial may acquit him

him of desertion, but find him guilty of absenting himself without leave, and punish him accordingly ; but they cannot declare him guilty of mutiny, or any other distinct crime or offence, (though there may appear strong suspicion of his being so) unless it be likewise in the charge given against him before the trial commences*. But in this case the court are expressly to insert in their verdict or opinion, that they acquit him of the crime of desertion, but find him guilty of that of absenting himself without leave ; for in a court of law, it hath been adjudged†, that if a jury on an indictment, or appeal of murder, find the defendant guilty of manslaughter, without saying expressly as to the

* If in the course of the trial for one crime there appears strong suspicion of another, which is not given in charge to the court, though the prisoner may be acquitted of the one he is then tried for, the court may order him into confinement, and he be brought to a new trial for the crime he was suspected of.

† Hawkins's Pl. of the Crown, b. 2. c. 47. s. 5.
1. Anderson's Rep. 103, 104.

O

murder

murder, it is insufficient and void, as being only a verdict for part.

IT is usual at courts martial, as well as in courts of law, to allow offenders in criminal cases to bring in persons of credit, to give their testimony of the accused person's good behaviour and integrity of life. This custom is very ancient, having been in use among the Romans, by whom it was called *laudatio*, and the persons *laudatores*, of which the smallest number called used to be ten*. The testimony of these witnesses may be of the greatest service in some cases; as in that of a man tried for murder, if they prove that he is not of a quarrellsome, revengeful temper; for though it may be clear to the jury that he put the man to death, yet this may induce them to acquit him of murder, and find him guilty of man-slaughter only; an alleviation that the law allows for the frailty of mankind, when it does not appear that the fact was

* Kennet's Ant. of Rome, p. 2. b. 3. c. 18. p. 40.

committed

committed with malice aforethought, but in sudden gust of passion. Or if a soldier be tried by a court martial, for mutiny, desertion, &c. and there is only presumptive proof against him, creditable witnesses to his former character and behaviour will certainly influence the court in some measure in his favour; but where there appears positive proof of such mutiny, desertion, &c. the court cannot avoid finding him guilty, and passing sentence accordingly, let his former character be ever so good, though it may perhaps induce them to recommend him for mercy, the granting of which is solely vested in the king, or the general who approves of the proceedings; and therefore out of the power of the court martial.

WHEN the members are ready to give their opinions, the judge-advocate is to put to every one, separately, this question. From the evidence given for and against the prisoner, and from what he had to of-

fer in his defence, are you of opinion, that he is guilty or not guilty of the crime or crimes laid to his charge? If the majority find him not guilty he is accordingly acquitted; but if it appears, upon the casting up of the votes, that the majority declare him guilty, those who have found him so (for it cannot be supposed that those who have found him not guilty would affign him a punishment) are to pass sentence or judgment on him, for laws would be of little effect, unless they could impose pains and penalties upon the offenders against them.

THE pains and penalties are various, according to the nature of the offences, or the detriment that comes thereby to society; some are corporal, but not capital, such as imprisonment, flagellation, &c. others are capital, *ultimum supplicium*, or death.

THE laws of man are supposed to be founded on the laws of God and nature; but to observe strictly that of retaliation,
or

or the *lex talionis*, which is, *eye for eye, wound for wound, stripe for stripe, life for life*, &c. would not suit the present degenerate age; the inflicting of punishments being, in most cases, more for example, and to prevent evils, than to punish; for when offences grow enormous, severe punishments, even death itself, is necessary to be annexed to laws in many cases, by the prudence of law-givers, though possibly beyond the single demerit of the offence itself, simply considered.

THE articles of war, in a few cases, point out the express sentence to be passed on criminals, without any alternative; in some an optional power is given, of punishing with death or otherwise; and in others, offenders are punished at the discretion of a court martial, omitting the word *death*, evidently meaning thereby to exclude the power of punishing capitally.

THE capital punishments inflicted by martial law are common to both officers and private soldiers, and are generally executed in the same manner, but a wide distinction should be made in the mode of inflicting punishments of an inferior kind on officers and soldiers. What may be regarded as a slight penalty inflicted on the one, would be considered as of great magnitude to the other, and so *vice versa*; for habit and education make wide distinctions in the minds and manners of mankind. To dismiss an officer from his Majesty's service would be esteemed a heavy punishment, whereas a private soldier would look upon it, in many cases, as a favour conferred on him; and on the other hand, a corporal punishment, which but seldom operates on the feelings of a private soldier, must touch a commissioned officer so sensibly, who has the sentiments of a gentleman, as to render his future life a burthen to him.

FOR

FOR crimes that officers and soldiers may be guilty of, which are not of so capital a nature as to deserve death, *cashiering* is prescribed for the former, and corporal punishment for the latter; and for misdemeanours of a still more inferior nature, custom has introduced suspension for a time, public and private reprimands, &c. for officers, and other slight punishments for soldiers.

ANOTHER punishment has latterly been authorized by act of Parliament, which is sending soldiers, who may be convicted of crimes not sufficiently capital to be punished with death, to serve in regiments abroad, either for life or a term of years; and in case they return, to suffer death. This is in some measure like transportation by the courts of law (which is now altered to hard labour on the river Thames) though not so exemplary and shameful a punishment; for they in fact only suffer what many others of his majesty's troops

are liable to, who have never been convicted of any crime.

SUCH are the different punishments inflicted by martial law, and by which every member of a court martial is to be guided in passing sentence.

IF a prisoner is found guilty of a crime, in the punishment of which there is no alternative, any further questions become unnecessary; if convicted of an offence punishable at the discretion of a court martial, the next obvious and only requisite question more is, what punishment shall be inflicted on the prisoner, whom you have found guilty? but in cases where an optional power is vested in the court, to punish with death or otherwise, the question to follow that of *guilty or not guilty* (upon the court, or the majority of it, declaring for the former) is, whether or not the prisoner shall suffer death? If two thirds of the court do not concur in the affirmative, the votes of
the

the affirmants are considered as void, being incapable of taking effect, as no sentence of death can be given against any offender, by a general court martial, unless nine out of thirteen or two-thirds of those present concur therein. A lesser number then being incompetent to give judgment of death another question becomes necessary to be proposed to every member indiscriminately, viz. what punishment (other than death, shall the prisoner undergo? and each member gives his voice (*de novo*) in this question, wherein a *majority* of the members is competent to determine.

THIS is the usage which has long obtained; should it however be contested that a member is not compellable to give his voice for any other punishment, having once given his vote for death, in that case (for the strict right can never be brought to a decision in the person of any individual, as the very stating of the matter would tend to disclose the particular vote) it must
of

of necessity be, that the sentence pursue the major part of those who did not give a voice for death, though they should happen to be but an inconsiderable part of the whole court taken collectively.

It may often happen that the court is unanimous, both in their opinion concerning the guilt of the prisoner, and the judgment passed on him, but the judge-advocate, in registering such opinion and sentence, is by no means authorised to insert the word *unanimous*; on the contrary, he is absolutely sworn not to divulge the vote of any particular member, whereas by the insertion thereof he would disclose that of every one; but where there is a diversity of opinions, it is necessary that he retain private *memoranda* of those of every individual, that he may be prepared to give evidence thereof, as a witness, to a court of justice, in a due course of law, as his oath expresses.

MARTIAL

MARTIAL law is laid down in so plain and simple a manner, that every military man is, or ought to be acquainted with what are thereby deemed crimes, and may judge in a great measure, what is to be expected by one who is guilty of any of them; but at the same time he has the satisfaction to know that he must be previously convicted by a court, where justice and equity always preside, and where the innocent can run no risque of punishment, but the guilty are in general sure to meet with their deserts.

[illegible]

AN
E S S A Y
CONCERNING
CRIMES AND PUNISHMENTS,
BY
MAJOR STEPHEN PAYNE ADYE.

MISERA EST SERVITUS, UBI IUS EST
VAGUM AUT INCOGNITUM.

THE STATE OF NEW YORK

CRIMINAL JUSTICE

CRIMINAL JUSTICE

T O

JAMES PATTISON, Esq.

MAJOR-GENERAL *of his* MAJESTY'S
FORCES, *and* COLONEL-COMMANDANT
of a Battalion *of the* ROYAL REGIMENT
of ARTILLERY, &c. &c. &c.

S I R,

TO inculcate the advantage of preventing crimes, and its superior efficacy to the reformation produced by severity and rigour, are principal objects of the following treatise. It is also my anxious wish to recommend the faithful distribution of rewards, as a high inducement to virtuous conduct. Such being the views with which I composed these sheets, I could not possibly find a patron to whom I could
address

DEDICATION.

address them with a happier propriety. For it is universally known that you have distinguished yourself in your public capacity, by the most fortunate intermixture of justice and humanity. But while my subject points to you so forcibly, I feel a flattering pride in the opportunity afforded me of appealing to the entire friendship which subsists between us. Be so kind, then, as to accept the tribute which so fully belongs to you.

I have the honour to be,

With the most perfect respect,

S I R,

Your most faithful and

Most humble servant,

STEPHEN PAYNE ADYE.

AN
ESSAY
ON
MILITARY PUNISHMENTS
AND REWARDS.

IT will be necessary to divide this subject into two parts, and to speak of each separately. First, then, of penalties and punishments.

PUNISHMENT, as defined by Grotius, and subscribed to by Selden and Puffendorf, is an evil of suffering, on account of some bad action, *malum passionis, ob malum actionis*; but the author of a modern work, entitled, *Considerations on Criminal Law*, defines punishment to be an evil

P

which

which a delinquent suffers unwillingly, by the order of some lawful superior, on account of some act, wilfully done, which the law prohibits, or of something omitted, which the law enjoins.

THE making of laws penal may claim the same origin as that of laws themselves ; for when God gave his first commandment to Adam, which was that he should not eat of the tree of knowledge of good and evil, he also ordained, that, in the day he eat thereof, he should surely die ; and we find, ever since, that although different nations have adopted different modes of punishment, yet it seems to have been the general system, that laws would have been of very little effect, if they had not also given a sanction for imposing penalties.

THE inflicting of punishments, as I have already observed in the Treatise on Courts Martial, being more for example, and to prevent evils, than to punish, when offences

ees grow enormous, severe punishments, nay even death itself, is necessary to be annexed in many cases, although possibly beyond the single demerit of the offence, simply considered. But yet, I cannot but discommend the making capital punishments too familiar; for when a man, after committing perhaps a trifling crime, finds that the penalty attending it is the same, as if he had been guilty of a more enormous one, it is a strong inducement to a vicious mind to dive deeper into guilt. When great punishments are only inflicted for great crimes, it will be the more easy to reform abuses, because all the world concurring in the necessity of them, will cheerfully promote their effect; whereas, if capital penalties are incurred upon every trifling occasion, humanity will revolt at the idea, and induce officers often to hide and overlook the lesser crimes soldiers may be guilty of, rather than bring them to conviction. But when there is a necessity of making a public example, although we may

betray a concern at being obliged to exercise, with rigour, the rules of military discipline, we should look upon cruelty and severity as terms misapplied in an exemplary punishment.

HOWEVER, so averse am I to punishment in general, that every method, I think, ought to be previously taken, to deter soldiers from committing crimes, rather than trust to a reformation, by punishing them. If a man, who has any sense of honour, is once made a public example of, despair will frequently drive him to commit crimes before unthought of; or, at least, he will give himself up to shame and remorse, and thereby a subject is, I may say, irretrievably lost, who, by more lenient treatment, might have been of eminent service to his country. The most excellent natures will sometimes err, but may be again restored to their former state, by a sense of shame and honour alone; but tem-

pers innately vicious can hardly be exalted into good habits, even by punishment.

I CANNOT resist the temptation of offering to the consideration of my readers, the sentiments of some authors of high repute, who have coincided with, or rather (to do justice to their worth) have implanted in me the doctrine of prevention of crimes, in preference to trusting to reformation by subsequent punishment.

THE method of preventing crimes, says Lord Coke, who writes on this subject in rather general though not less pointed terms, is, 1st, By training up youth in the principles of religion, and habits of industry; 2dly, In the execution of good laws; and 3dly, In granting pardons but rarely, and upon good reasons. Every wise legislature will, in the enacting of criminal laws, have it in contemplation, rather to prevent than punish crimes; and whilst they chastise the

delinquent, will endeavour to reform the man.

FROM the present mode of forming our soldiery, we are in general obliged to take recruits, without previously consulting whether they have been trained up in their youth, in the principles of religion, and habits of industry; but a prevention of crimes is certainly in our power, which to a humane heart will ever be a more pleasing task, than the execution of the very best of laws, and this prevention will tend to render the necessity of pardons more and more rare.

WHAT then can be more conducive to the deterring of men from committing crimes, than making them properly acquainted with the laws* by which they are to be governed,

* Justinian has reduced the whole doctrine of laws to these three general precepts. "Juris præcepta sunt honeste

ed, and the fatal consequences attending a breach of them.

I do not know, says the humane and benevolent Marquis of Beccaria, in his most excellent essay on crimes and punishments, of any exception to this general axiom, that every member of society should know when he is criminal, and when innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty. Would you prevent crimes, let the laws be clear and simple; let them be intended rather to favour every individual, than any particular classes of men; let the laws be feared, and the laws only.

It is an honour, and almost a singular one to the English laws, that they furnish

“ *honeste vivere, alterum non lædere, suum cuique
“ tribuere.*” And Grotius defines equity to be,
“ the correction of that, wherein the law, by reason
“ of its universality, is deficient.”

means

means of preventing the commission of crimes. Of all the parts of a law, the most effectual, pleads Blackstone, is the indicatory; for it is but labour lost to say, "do this, or avoid that," unless we also declare "this shall be the consequence of your non-compliance."

ANOTHER modern writer thus joins in sentiment. The prevention of crimes should be the great object of the law-giver, whose duty it is, to have a severe eye upon the offence, but a merciful inclination towards the offender. It is from an abuse of language that we apply the word "punishment" to human institutions. Vengeance belongeth not to man. Criminals, says Plato, (*de legibus*) are not punished, because they have offended; for what is done cannot be undone, but that for the future the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice. *Meti Suffeti, inquit Tullus, se ipse dicere posses fœdera ac fidem servare, vivo tibi*

tibi ea disciplina a me adhibita esset: nunc quoniam tuum insanabile ingenium est, Tu tuo supplicio doce humanum genus ea sancta credere, quæ a te violata sunt. It is the end then of penal laws, to deter, not to punish. To effect this, other means may be subjoined to that of making men previously acquainted with the laws by which they are to be governed; and none can throw more additional weight into the scale, than binding them by the most solemn and sacred ties to a due observance thereof.

IN every nation, and in every age, an oath has been of the greatest consequence and consideration in promises, agreements, and contracts.

“AN oath with sacred awe, doth rouse the
 “soul,
 “And thus restrains her, from the double
 “mischief
 “Of ang’ring friends, and of offending
 “Heaven.”

SOPHOCLES.

THE

THE Romans, as soon as they had compleated their levies, obliged every soldier to take a military oath, by which he engaged to hazard his life for the common wealth, to obey his general, and not to fly from his colours, or quit the army without leave. The whole legion, passing one by one, swore to the same, each saying as he went by, *Idem in me*. This, and some other oaths, were so essential to the military state, that Juvenal, in Satyr XIV. 35, uses the word *sacramenta* for *milites* or *militiæ*. Nor was this a mere ceremony, but a solemn act of religion, and esteemed so consequential, that no man was deemed a soldier, nor allowed to strike or kill an enemy, if he had not taken the customary oath; and this oath was held so sacred amongst the troops, and became so inviolably a bond of fidelity and subjection, that the soldiers, however displeased and enraged, did not dare to quit their general, so long as this tie was supposed to remain in force; nay so very tender and scrupulous were they, that even
in

in their greatest impatience to be discharged, they would never admit of any interpretation that carried in it the least strain or appearance of deceit.

NAY, such was the influence of an oath amongst them, that nothing bound them stronger to the laws.

THEY often did more for the observance of an oath, than they would ever have performed for the thirst of glory, or for the care of their country, as appears in many instances recorded in history. Hence it was an usual stratagem in a dubious engagement, for the commanders to snatch the ensigns out of the bearers' hands, and throw them among the troops of the enemy, knowing that their men, so far from abandoning them, would venture the greatest danger to recover them.

AMONG the Greeks we likewise find, that the military oath was accounted inseparable

nable from the state of a soldier. This solemn method of enforcing obedience and fidelity prevented the two greatest crimes a soldier can be guilty of, viz. mutiny, and desertion; crimes too frequent in our modern armies, and which are of the utmost consequence, when once they get any footing. It may seem strange that those, who call themselves Christians, should be more apt to commit perjury and breach of faith, than Heathens; yet I cannot account for it in a more favourable manner than by attributing it in a great measure, to our inattention to what we seem to think a mere matter of form, though found of so essential service among the ancients.

THE king of Prussia, (whom we may justly term a pattern for modern heroes) highly sensible of how much advantage it is, that a soldier be strictly bound to be firm to his trust; and at the same time conscious of the injustice of punishing a man for a crime, which he does not know to be so, expressly

exprefsly directs in his military regulations, that when the new colours or standards of a regiment are sworn to, the folicitor fhall firft make an harangue, and read the articles of war, and the chaplain then fay a prayer, imploring God, out of his grace and goodness, to fave every foldier from being perjured, and fo to govern him, that on all occafions, in battles, fieges, and engagements of any kind, he may continue firm to his colours, and maintain them againft an enemy, to the laft drop of his blood. And he further directs, that when a recruit fwears to the colours or standards, the violation of an oath, and the divine vengeance which will infallibly attend it, muft be explained to him, and he himfelf acknowledge, that he underftands every particular well, and voluntarily offers to be conformable thereto, before he takes the oath.

ALTHOUGH we have no *ordonnance* or regulations, with refpect to troops fwearing to their colours, fome ceremonies, fimliar

to

to those practised in the Prussian service, have been introduced and adopted in ours, on the colours being first presented to a regiment. But on recruits being enlisted subsequent thereto, they are hurried away to a justice of the peace, before whom they take an oath of fidelity ; but no clergyman ever attends, in order to point out to them, how much they offend their God, as well as their king, by a breach of that oath. And the generality of them are too prone to think, that the safety of their bodies should be their only care, after forfeiting their engagements, without suspecting their souls to be any ways concerned.

A STRONG proof of what I assert presented itself at the execution of a grenadier, who was shot at Plymouth, during the late war, for desertion, and who suffered with great fortitude, being conscious, *he said*, of having done nothing to offend his Saviour.

THAT

THAT a prevention of crimes, as far as the frailties of human nature will admit of it, should be the primary object of every wise legislature, whether in a civil or military line, is too obvious to require any farther argument or illustration ; but whatever may have been the virtue of the ancients, we see too frequent instances in the modern world, to convince us, that many men are not to be deterred from vice, although ever so well acquainted with the atrociousness of it ; it must therefore be allowed, that there is an absolute necessity of sometimes inflicting punishments for the good of society. Heirotles calls punishment the medicine of wickedness ; that punishment is essential, in order to keep up good order and military discipline in an army, must be evident to every military man ; and that military discipline is more conducive to victory than numbers, is as apparent.

NEXT to forming of troops, says M. Saxe, military discipline is the first object that presents

presents itself to our notice; for it is the soul of all armies: and unless it be established amongst them with prudence and unshaken resolution, they are no better than so many contemptible heaps of rabble, which are more dangerous to the very state that maintains them, than even its declared enemies.

THE Romans, as Professor Duncan observes, from small beginnings, rose by degrees to be sovereigns of the world. If we enquire into the causes of this, we shall find that nothing so much contributed to it, as their excellence of military discipline. The many difficulties the king of Prussia extricated himself from, during the last continental war, when surrounded by armies so far superior to him in numbers, are recent proofs how much military discipline is conducive to victory. And I think I may, without vanity, add, that the many successes of the British arms over those of
France

France and Spain, were not attained by superiority of numbers.

SINCE then military discipline is so essential to an army, and punishments so necessary to military discipline, it will be proper now to speak as well of the uses of punishment in general, as of the several modes of inflicting it.

THE several uses of punishment may be reduced to three. The first, which is common to all punishments, except death, is to reform those that are punished.

THE second, which is peculiar to capital punishments, is to put the criminals out of a condition of causing new troubles to society; and the third and last, which is common to all sorts of punishments, is the use of example, for restraining by the sight and fear of punishment, those who abstain from crimes, only out of fear; and it is this example that diminishes the number of crimes,

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which

which would multiply to a strange degree, if they were suffered to go unpunished.

If reformation in the person of the punished is the object, the punishment should be such as may give temporary pain and anxiety, whether corporal or otherwise, to the sufferer; but which should carry no lasting infamy with it, other than the reflection of having been punished, and should vanish in time, not only from the recollection of the world in general, but that of the culprit himself, provided repentance is an attendant thereto.

If the object be, to put criminals out of the power of causing new troubles to society, nothing more can be said, than, at the execution of a sinful mortal, it should be endeavoured to convince the multitude that it was necessity, not inclination which led the legislature to bring him to that untimely end, and to warn them against following the same evil ways. And lastly, with respect to the use
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of example, nothing in general can be more prevalent; yet we find that this is often insufficient; however, it is the best apology that can be made for legislatures who inflict what otherwise might be deemed cruel and inhuman punishments.

THE modes of punishment have varied according to the ideas, whether political or religious, of different nations and sects. To enter into a detail of those hitherto practised, was it even possible to recount them, would be foreign to my present subject; it cannot however be erring from it, to examine those which may be termed the military punishments of such, whose arms have shone with the greatest splendour, in order, by comparing them with our own, we may be the better able to judge wherein we can amend. For nations, no more than individuals, are infallible, and therefore ought not to be so tenacious of their own customs, as not to pay due attention to those of others, even of an enemy. Death may be

esteemed by all, the *ultimum supplicium* or most capital punishment, but this may be accounted more or less severe, according to the manner of executing it.

TORTURE, I declare my aversion to; but as punishments are meant more for example, than to give pain to the offending culprit, death may be inflicted in a more or less disgraceful manner, according to the nature of the crime. As for instance, in the French service, those who desert into an enemy's country are hanged, but those who desert to engage in another regiment, or without quitting France, are shot.

THE military punishments used by the Romans were such as reached the offender's body, credit, or goods.

THE principal corporal punishment was something like running the gantelope, in practice amongst many modern nations, although generally attended with more fatal consequences,

consequences, and therefore may be accounted for the most part *capital*; for as soon as the criminal had liberty to run, the soldiers were allowed to kill him if they could; so that being persecuted with swords, darts, stones, and all manner of weapons on every hand, he was presently dispatched. This penalty was incurred by stealing any thing out of the camp, by giving false evidence, by abandoning his post in battle, by pretending falsely to have done some great exploit, from hope of reward, or by fighting without the general's order*; by losing their arms, or aggravating a misdemeanour, by repeating it three times.

If a great number had offended, as running from their colours, mutinying, or other general crimes, the common method of proceeding to justice was by decimation; that is, every tenth man being to die, was exe-

“ * In bello, qui rem a duce prohibitam, fecit,
 “ aut mandata non servavit, capiti punitur, etiam si
 “ res bene gesserit.”

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cuted;

cuted; for which they drew lots. By this means, though all did not suffer, yet all were terrified into obedience. In some authors, we meet with *vicefimatio* and *centefimatio*, which terms sufficiently explain themselves.

THE punishments that reached no farther than a soldier's credit, by exposing him to public shame, were degrading him from a higher rank to a lower; giving him a set quantity of barley instead of wheat; ungirding and taking away his belt; making him stand all supper time, whilst the rest sat down; and other marks of disgrace. But shame, it must be observed, loses its effect, when punishment is inflicted without a just and careful distinction, or when by wantonness or oppression it is made too familiar. However, shame will alone, in some cases, work reformation, sooner than severer punishments, which even cause bodily pain.

ARTAXERXES

ARTAXERXES enacted, that the nobility of Persia, who debased themselves, instead of being lashed, which had been the practice, should be stripped, and the whipping to be given to their vestments; and that instead of having the hair plucked off, they should only be deprived of their high crowned *tiaræ*. And the Lacedemonians punished a coward, by cloathing him in womans apparel, and making him stand every third day in the market or other public place, which was looked upon by men of spirit as worse than death. Aulus Gellius has recorded a very singular punishment amongst the Romans, by letting the delinquent bleed. His judgment concerning the origin of this custom is to this purpose. He fancies that in former times this used to be prescribed to the drowfy and sluggish soldiers, rather as a medicinal remedy than a punishment; and that in after ages it might have been applied in most other cases, upon this consideration, that all those who did not observe the rules of discipline were to be

looked upon as stupid or mad; and for persons in that condition, blood-letting is commonly successful.

BUT because this reason is hardly satisfactory, *Muretus* has given us another, believing the design of this custom to have been, that those mean spirited wretches might lose that blood with shame and disgrace, which they dared not to spend nobly and honourably in the service of their country.

As for the punishment relating to their goods and money, the tribunes might for several faults impose a fine on the delinquents, and oblige them to give a pledge, in case they could not pay; sometimes too they stopped the stipend, whence they were called by way of reproach *ære diruti*.

AMONGST the Egyptians, neglect of duty, flying in battle, or cowardice, was punished only by marks of infamy, it being thought more adviseable to keep them in order,

der, by the motive of honour, than fear of punishment; and mutiny and desertion were punished by degradations and disgrace, which could never be wiped away but by brave actions; but those who betrayed secret designs had their tongues cut out.

It is remarkable that by the laws of Lycurgus, amongst the Spartans, stealing was lawful, and encouraged as a military exercise, but punishable if found out. Plutarch relates a story of a boy, who having stole a fox, and hid it under his coat, chose rather to let it tear away his very bowels, than discover the theft.

By the laws of Athens, those who maintained their post with courage were advanced, but others were degraded. All who refused to go into the army, cowards and run-aways, were expelled the forum, were not crowned, and could not go to the public temples. He who cast away his arms was declared infamous.

THE

THE ancient Germans admitted of none but pecuniary punishments, being of opinion that their blood ought not to be spilt but with sword in hand; on the contrary, these punishments are rejected by the Japanese, under pretence that the rich might elude them.

ACCORDING to Tacitus, the Germans knew only two capital crimes; they hanged traitors, and drowned cowards. Amongst other modern punishments, the gantelope has been adopted, not only by the Prussians, but most other German powers; it is likewise in use amongst the French, although seldom inflicted, except for capital crimes; for it being reputed ignominious, because inflicted on common rogues and vagabond, by the hands of the hangman, the sufferer is always obliged to pass under the colours, after he has received his punishment, in order to take off this idea of ignominy which is attached to it; and even this ceremony is often found insufficient to
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wipe off the stain so effectually as to prevent desertion. Upon desertion growing to great height in France, it was judged proper to punish such delinquents with death, and yet their number did not decrease. The reason, argues Montesquieu, is very natural. A soldier, accustomed to venture his life, despises, or affects to despise the danger of losing it.

I AM not so prejudiced in favour of the customs of my own country, as to condemn all others as faulty ; neither do I mean to adopt one, merely because it is Roman, and reject another, because flowing from a nation of less repute. What I shall now attempt, is impartially to point out the errors or excellencies of those I have just recited, together with those of our own, and then draw some general observations on punishments in general. Death, as was before observed, may be executed in a more exemplary manner for one crime than another, although not attended with more torture to the

the criminal, and therefore I am naturally led to approve of the distinction made in the French service between hanging and shooting; for although they both terminate in the same manner, the suffering as a common felon may be justly esteemed a more capital punishment, than in a method peculiar to a soldier.

My aversion to a cruel manner of inflicting death must consequently induce me to condemn the Roman method of executing it, by allowing the criminal to be shot at by the soldiers with darts, &c. but their punishments which reached their credit, by exposing them to public shame are highly commendable; for nothing is more likely to work a reformation in a soldier, who ought to have some sense of honour, or else is unworthy of the name, than inflicting a punishment which may be wiped off by his future good behaviour.

FINES

FINES being sometimes imposed, may also be attended with good consequences, for those who are inclined to avarice and love of money will think this a very severe penalty; but as to the method of letting blood, practised by the Romans, whatever might be *their* motives for it, it appears too romantic to carry any weight with it among the modern soldiery.

DESERTION has ever been regarded, by both ancient and modern nations, as a military offence of the greatest magnitude. Charondas, the famous law-giver of the Thurians, instituted a whimsical punishment for this crime, not unlike that of the Lacedæmonians for cowardice: he enacted, that deserters should be compelled to sit three days in the market-place, in female dresses; and this law, says Diodorus Siculus, excelled the provisions of other law-givers on the same object, both in humanity and wisdom.

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It was anciently the custom in France to cut off the ears, or slit the nose of a deserter; and Montesquieu thinks that it was absurd to relinquish this practice, for the punishment of death. For soldiers, argues he, are habituated to the contempt of death and the dread of shame, so that the terrors of the penalty were diminished, whilst they were intended to be encreased.

THE Jews used to give wine mingled with myrrh to a malefactor, at the time of his execution, in order, as it is said, to cause a stupor, and deaden the sensibility of the pain; and amongst the Athénians, a murderer, after trial and conviction, was left to the relations of the deceased, to be put to death if they thought proper, but they were not permitted to use any degree of torture, or to extort money.

To conclude then the particular subject of military punishments, I shall go into a short recapitulation of what has already been
been

been said, and make a few observations on punishment in general. I have gone through a detail of the military punishments of both ancient and modern nations; some of them appear too severe, others too lenient.

As punishments become more mild, clemency and pardon are less necessary. That punishments are essential to the good of society in general, and particularly to the keeping up good order and discipline in an army, is too apparent to call for argument; but it must, I should think, appear, that the work of eradicating crimes is not to be effected by making punishments familiar, but formidable; to be both is not possible, for familiarity with punishment, as with other things, will breed contempt.

IN assigning punishments, not only the nature of the crime or offence, but the motive which induced the person to commit, and the circumstances attending the committing of it, are to be considered. For it may be committed,

mitted, either out of premeditated design, in the heat of passion, or through imprudence, which may each be considered in its proper degree ; thus, in a transport of passion, it is more culpable than when proceeding from imprudence ; and through premeditated design, more heinous than in a transport of passion. The violence of passion or temptation may sometimes alleviate a crime ; as theft, in case of hunger, is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon a sudden and violent resentment, is less penal, than upon cool deliberate malice. The age, education, and character of the offender, the repetition (or otherwise) of the offence, the time, the place, the company, wherein it was committed ; all these, and a thousand other incidents, may aggravate or extenuate the crime. Sir Michael Forster, in the preface to his Reports, observes, that no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man

man to conclude, that he may not at some time be deeply interested in these researches.

THE infirmities of the best amongst us, the vices and governable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us, (upon a moments reflection) that to know with precision what the laws have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

WHATEVER species of punishment is pointed out as infamous, will have the effect of infamy. Imprisonment is an usual preparatory step to trial ; and is also adopted as a punishment for certain crimes, on conviction thereof ; but imprisonment, inflicted as a punishment, is not according to the principles of wise legislation. It sinks useful subjects into burthens on the community, and has always had a bad effect on their

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morals ; nor can it communicate the benefit of example, being in its nature excluded from the public eye.

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is most pernicious to society rather than that which is less.

SOLEMNITY in punishment is requisite, for the sake of example, but let not death be drawn into lingering sufferance ; detain not the excruciated soul upon the verge of eternity. There should be no such thing as vindictive justice. Public utility is the measure of human punishments, and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is lost in sympathy with the superfluous sufferings of the criminal, the example loses its efficacy, and the law its reverence. It is not the intenseness of the
pain

pain that has the greatest effect on the mind, but its continuance; for our sensibility is more easily and more powerfully affected by weak, but repeated impressions, than by a violent, but momentary impulse. The power of habit is universal over every sensible being. The death of a criminal is a terrible, but momentary spectacle, and therefore a less efficacious method of deterring others, than the continued example of a man, deprived of his liberty, condemned as a beast of burden, to repair by his labour the injury he has done to society. The execution of a criminal is, to the multitude, a spectacle which in some creates compassion, mixed with indignation.

THE severity of a punishment should be just sufficient to excite compassion in the spectators, as it is intended more for them than for the criminal. A punishment, to be just, should have only that degree of severity which is sufficient to deter others.

THE depravity of mankind often obliges us to swerve from the Mosaical law, an eye for an eye, a tooth for a tooth, &c. but let not a mistaken zeal for the military service lead us too often to take away what we cannot give.

CORPORAL punishments, which are the next capital ones to death, should be sparingly made use of. Punish not a man in the same manner, for perhaps a few hours absence from his quarters, as if he had been a deserter from his country, and a violator of his sacred promise; for it is not the number of lashes, but the shame that must attend it, that constitutes the punishment. To fix a lasting, visible stigma upon an offender, is contrary both to humanity and sound policy. The wretch, finding himself subjected to continual insult, becomes habituated to his disgrace, and loses all sense of shame.

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THE Marquis of Beccaria concludes his essay on crimes and punishments thus: That a punishment may not be an act of violence of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime and determined by the laws.

*Let laws be fix'd that may your rage contain,
And punish faults, with a proportion'd pain;
And do not flea him, do not shoot him through,
That only doth deserve a stroke or two.*

CREECH'S HORACE.

FOR small crimes then find out adequate punishments, such as confinement, fines, double duty, &c. and by way of medium, degradation from one rank to another, or working at fortifications or other public works (I must be understood here to mean non-commissioned officers and private soldiers). Nay, let us not shut our hearts against pardon to repenting offenders; but let death, or even corporal punishment, in

whatever mode they are executed, be inflicted only for capital crimes.

SECONDLY, OF MILITARY REWARDS.

PUNISHMENTS and rewards, says Monticuculli, are the two great supports, either of the political or military world. And this doctrine seems not to be modern only; for thus says Cicero, "Solon rempublicam duabus rebus contineri dixit, *Premio et Pœna*." Puffendorf is of opinion, that the dread of evil operates more forcibly on the mind than the expectation of good; and therefore, that the sanction of laws must consist rather in penalties than rewards. But this is an hypothesis, (for I cannot allow it any better term) that I will by no means admit of. I have really a better opinion of mankind than to believe it to be well founded.

FRUITLESS, and endless would be the pursuits of a soldier, or indeed of any one else, were he liable to punishment, without expectation of reward. A man who
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has not hopes as well as fears, must very soon sink into despondency; and more particularly a military man, who above all others should fly from despair. *Nil desperandum* should be his favourite thesis.

I HAVE commented largely on the subject of preventing crimes, in preference to trusting to reformation by punishment; I have still one very forcible argument to urge towards the furthering and advancing this favourite doctrine, which is to institute rewards for upright and virtuous actions.

There is no joy a gen'rous mind can know,
Like that of giving virtue its reward.

SHIRLEY.

THE coin of honour is inexhaustible, and is abundantly fruitful, in the hands of a prince who distributes it wisely*.

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* Amongst the Athenians, all disabled and wounded soldiers were maintained by the public; the parents and children of those who fell in battle were

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WITH the Romans, from whose renown we are naturally led to follow them as a pattern in military affairs, the encouragements of valour, and other martial virtues, were much more considerable than the proceedings against the contrary vices. The most considerable, (not to speak of the promotion from one station to another, or of the occasional *donations* in money, distinguished by this name from the largesses bestowed on the common people, and termed *congiaria*) were first the *dona imperitoria*, such as the *hasta pura*, a fine spear of wood, without any iron on it, which was bestowed on him, who in some small skirmish had killed an enemy engaging him hand to hand. They were reckoned very honourable gifts, and the custom of our great officers carrying white rods or staves, as ensigns

taken care of. If parents were killed, their children were put to school at the public charge, and when they advanced to maturity were presented with a suit of armour.

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of their places, is supposed to be derived from thence.

THE *Armilla*, a sort of bracelets; the *Torques*, golden and silver collars; the *Vifilla*, a sort of banners of different colours, and many others, amongst which we must not omit the *corona civica*, which was given to any soldier that had saved the life of a Roman citizen in an engagement. This was reckoned more honourable than any other crown, although composed of no better materials than oaken boughs. It was a particular honour conferred on the persons who had merited this crown, that when they came into any of the public shews, the whole company, as well senate as people, shewed their respect, by rising up when they saw them enter; and they took their seat on these occasions amongst the senators; being also excused from all troublesome duties and services in their own persons, and procuring the same immunities for their father and grand father by his side. These accumulated

culated privileges appear however to be carried to too romantic a height. But far greater honours and rewards were conferred on victorious generals, such as the *salutatio imperatoris*, the supplication, the ovation, and the triumph. It would be swerving too far from my subject, to enter into a minute description of these several honours or rewards conferred on successful heroes. Suffice it to say, by way of explanation, that the *salutatio imperatoris*, was nothing more than saluting the commander in chief with the title of *imperator* or emperor, on account of any remarkable success.

THE *supplicatio* was a solemn procession to the temple of the Gods, to return thanks for a victory. The *ovation* and *triumph* were processions made into and through the city of Rome, by a conqueror, with this difference chiefly, that the *triumph* was more solemn and splendid than the *ovation*. All, to be sure, matters of insignificancy in the great scale

scale of philosophy; and yet, do we not find, in the present enlightened age, men of the first rank and abilities pleased with, and seeking after with avidity, a red, green, or blue ribbon?

IF then the contagion for honorary rewards, which may be so easily complied with, still rages, why refuse them to military men?

THE Romans had a peculiar mode of distinguishing their soldiers for long and faithful services, which may be justly deemed a species of reward. They had always a number of soldiers of a more eminent degree than the commonality, known by the name of *evocati*. They were such as had served out the legal time, and been distinguished by particular marks of favour, as a reward for their valour; and it was regarded as a particular honour to be the general who received the voluntary attendance of such who were invited to, and not compelled

led to serve. In the field, their usual and ordinary duty was to guard the chief standard, being excused from all the military drudgery of standing on the watch, labouring on the works, or other servile employments. They were likewise indulged with the privilege of using the *vitis* or rod, which was the badge of a centurion's office.

THE Romans were of opinion, that good and wholesome laws might establish peace and unity within, but were by no means sufficient to screen a state from powerful and aspiring neighbours. The profession of a soldier was always held in repute, and he esteemed as the protector and defender of his country. The esteem of our country is of itself a reward far from being contemptible; and this, the Roman soldier, who was true to his trust, was always sure of; but the violent attacks that are daily made against a standing army in Great Britain, and the frequent insults that the soldiery meet with, when according to the regular and too generally

nerally received opinion, they are of no further service, are discouragements to a military life, that nothing but the true martial and patriotic spirit of a Briton could get over. The bad uses that have been made of armies, at particular periods, have created, in some weak minds an ill-founded jealousy; and the misconduct and irregularities of individuals have been often the cause of the whole body being condemned. The miserable wretches who are often admitted to bear arms by the present mode of raising recruits in England, are frequently guilty of crimes that bring disgrace upon the profession, but this inconveniency might easily be removed by a different mode of forming our armies.

IN the former edition of this work, I offered to the consideration of my readers, and particularly those in power, the propriety of one or more regiments of horse or foot bearing the name of some particular county (as the regiments of militia do) instead
of

of being distinguished by the name of their colonels, and the regiments being recruited from the county whose name they bore, where the civil magistrates should be obliged to assist in completing the corps; and I am happy to find that the idea has in some measure been adopted and put in practice; it may, we may hope, be improved upon, and rendered more extensive. There is every reason to suppose that it will create an emulation among the counties which shall produce the best regiments; and instead of the refuse of mankind, the army will be composed of at least an equal share of good men, with other trades and professions. Besides, each individual will be more attached, and consequently more interested for the honour of the regiment of Kent or Surry, than that of Colonel A. which to-morrow may be Colonel B's. An attachment to those with whom we are particularly connected, or bear relation to, the Romans were well aware of, as is evident, from their forming their troops into
legions,

legions, instead of distinct regiments. Bodies of such magnitude were linked together by the strongest military ties, and nearly interested in each others preservation.

By this mode of recruiting, our armies will consist of a set of men, more likely to merit rewards than punishments; and as the examples of our superiors are apt to be prevalent, we should be careful in the choice of our officers. It is a just observation, that there is seldom a rule without exceptions; but we shall generally find those, who have had the advantage of a good education, are most likely to be possessed of the virtues and qualifications necessary in an officer who is to be an ornament to his profession. The want of proper heads generally causes the ruin of corps: If officers become guilty of vices and irregularities, the soldier, as Folard observes, will contemn, rather than obey them; disobedience is the consequence of contempt, and mutiny that of disobedience.

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BUT to return from this digression to the subject of rewards.

IT may perhaps be impossible in a large and numerous army to distribute either punishments or rewards, strictly proportionable to the merit or demerit of every action; but when partiality becomes too conspicuous in those who are empowered to dispose of rewards, and they are bestowed on the least deserving, whilst those of real merit are disregarded, they are more likely to create jealousy than emulation; but on the contrary, when pure and uniform justice is to be the sole dispenser thereof, nothing can be more encouraging to both officers and soldiers, than the smallest trifle obtained as a token of their services. Ambition is the ruling passion of a soldier; it is that which prompts him to waste his youth, and impair his health; every prudent chief will then strive to excite it, when perhaps, even a smile, or other small mark of approbation, will gain the end; for rewards are not considered according

according to the intrinsic value of what may be given as such. The bare thanks of a monarch or a general, are of greater value to a truly noble and patriotic soldier, than the greatest pecuniary rewards that can be heaped on him.

THE *corona civica* to a Roman soldier, who had saved the life of a citizen in an engagement, was accounted, as was before observed, more honourable than any other, though composed of no better materials than oaken boughs.

I WOULD not however have the reader to imagine, that I am entirely averse from pecuniary rewards.

THE profession of a soldier, it is well known, is not a lucrative one; and I cannot see any impropriety in blending honour and profit together.

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THE English are a generous, and when actuated by a just cause, have shewn themselves to be, a warlike nation; it therefore becomes the more unaccountable, that they are not more attentive to the rewarding of their officers and soldiers. The order of the Bath is accounted a military order, and is often bestowed on general officers, but few or none of inferior rank are admitted to this honour, although many a one who has not the least pretensions to the name of a soldier is indulged with it.

“ Who never set a squadron in the field,
“ Nor the division of a battle knows
“ More than a spinster.”

SHAKESPEARE'S OTHELLO.

THIS, therefore, if it may be even termed a military reward, must be acknowledged to be a very limited one. And as to the rewards of the inferior classes of the soldiery, it is too notorious that there are many who enjoy the emoluments of Chelsea, who never faced an enemy, whilst those who have expended their

their youth, and lost their limbs in the service, are deprived of them.

It is much to be wished that a military order was established for officers in general, a custom approaching almost to uniformity in every kingdom, (our own excepted) nay in every petty sovereign state throughout Europe. I would not indeed have even the common soldier deprived of this badge of honour, if he merits it. His low station is rather a spur to his ambition, and a small mark of favour from his general is often as highly valued by him, as it can be by his superiors. We read of a soldier in Scipio's army, who having done several gallant actions, so as to deserve a reward, Scipio gave him a sum of money, exhorting him to persevere in his valour; but he, with a sad countenance, laid down the gold at Scipio's feet, demanding of him an honourable ensign of victory, in lieu of the gold, preferring glory before gain. Why then may we not expect to find men possessed of the same

noble sentiment in even the lowest stations of a British army. Earl Percy, some years ago, established an order of merit among the non-commissioned officers and private men of the 5th regiment of foot, to which no other claims were valid, but those of long and faithful services, or some remarkable instance of valour, or other military virtues. The good effects of this institution shew themselves most conspicuously in this regiment, and would shine forth with greater splendour, was it extended throughout the whole army, and at the same time never swerving from its native purity.

HOWEVER, as I before observed, since advance of honour, and encrease of wealth, are not incompatible, why may not pensions, grants of conquered lands, &c. be attendant on the cross, star, medal, or other badge of honour, peculiar to the military order, in a proper proportion to the time of service, or mark of valour of the person to be rewarded? This would not only be an encouragement

encouragement to those already in the service, but a strong incitement to others, who although possessed with a desire to serve their country, are discouraged from it by the injustice they are liable to whilst in the service, and the small reward (if any) they may afterwards expect.

THE Romans rewarded their soldiers and citizens (characters with them united in one and the same person) with grants of conquered lands; but an unequal distribution thereof was one cause, amongst many, that first staggered the empire. Long did they struggle for an *agrarian law* to remedy this evil, regarding it as the bulwark of the state. But a distribution of lands was not the only reward and inducement to a military life.

THE profession of a soldier among the Romans was not as with us a slavery for life, attended with infinite fatigue, and scarcely any profit. At the close of a campaign the

soldiers were dismissed, every one to his own home, to look after his domestic affairs, and cultivate his inheritance.

GREATER encouragements still had the soldiery to face the dangers of the service; the high honours to which their profession paved the way, made difficulties vanish and disappear. Innumerable rewards and distinctions were invented, suited to the different stations of men, and the several kinds of valour in which they might render themselves conspicuous. Magistracies and dignities were almost always conferred, according to the reputation of the candidate, for bravery in war. And at the same time that military merit never failed to promote the person in whom it was lodged, no one was capable of civil employment in the commonwealth, who had not served in the army, at least ten years.

A GRANT of certain portions of lands in America was given on the conclusion of the peace of 1763, to such officers and
soldiers,

soldiers, as had served, during the war, on that continent, and were reduced to half pay, and to non-commissioned officers and soldiers, who had also served there, and had been disbanded ; but the want of method in arranging these matters, rendered this bounty of very little service to those for whom it was intended ; and the partiality of confining it to those only who had been employed in the western hemisphere, tended to raise jealousies among those, who had equally served their country in other parts of the globe.

Towns taken are never now given up to plunder, as was formerly the practice among the ancients, by which the conquerors were not only enriched, but it often served to aggrandize their posterity ; but at present, countries exposed to pillage redeem themselves by contribution, no part of which comes into the hands of the officers or men.

THUS, the miseries of hunger, heat, and cold, the certainty of blows, and the uncertainty of reward, are inseparable from a military life.

I WOULD not wish to incur the censure of drawing invidious comparisons, but for a moment let us throw a veil over the military manners and customs of Rome and other ancient nations, as well as those of modern repute, and coming nearer home, take a review of the advantages accruing, and emoluments acquired by the officers and private men of the navy, in proportion to those of the army. I have already delineated the hopes and expectations of both officers and soldiers of the army; those of the navy, comparatively speaking, would form a moderate sized volume. Suffice it then barely to observe on what is notoriously known, that one fortunate capture will enrich a captain of a man of war, and his crew, for ever, but what has the military officer or soldier, who has endured the fatigue

tigue and danger of many a well-fought battle, and perhaps loss of limb, to gild the bitter pill of adversity, but the reflection that his misfortunes as far as affect himself, flow not from fault, but misadventure. A heart-felt satisfaction, though but cold comfort.

THE Romans, though so ready to reward their officers and soldiers with lands, did it warily, with respect to the magnitude of the reward. God forbid, said Curius, that any man should look upon that, as a small piece of land which is sufficient to maintain him. Montesquieu, who reasons on general principles, observes, that great rewards in both monarchies and republics are a sign of their decline, because they are a proof of their principles being corrupted; and that the idea of honour has no longer that same force in a monarchy, nor the title of a citizen the same weight in a republic. And in reasoning on these general principles, he terms England a republic disguised under the form of

of monarchy ; and observes that in despotic governments people have a greater dread of death, than regret for the loss of life, consequently their punishments ought to be more severe. In moderate states they are more affraid of losing their lives than apprehensive of the pain of dying ; punishments therefore which deprive them simply of life, are sufficient ; and in despotic governments the prevailing principle is terror ; in a monarchy or republic, the spring of mens actions is honour or virtue.

It would be a great abuse to condemn to the same punishment, observes that favourite author, (Montesquieu) a person that only robs on the high way, and another who robs and murders ; and on the same parity of reasoning, one who simply neglects his military duties for a time, and another who abandons his colours entirely, and perhaps joins your enemy, and opposes you in the field.

To

To draw then some general conclusions from what has been said, both with regard to military punishments and rewards, as far as they appear consonant to the British constitution. Martial law, says Lord Chief Justice Hale, is no law at all, but merely indulged and regarded as an excrescence ; however, this excrescence has not only been admitted, but encouraged by the legislature, year after year, since a standing army in great Britain has been judged necessary for the preservation of the ballance of power in Europe. And military discipline, as M. Saxe expresses it, has been found to be the soul of armies. But at the same time that we are sanguine in our own wishes for the good of his majesty's service, let us not forget that every soldier is a human creature, susceptible of the same feelings and passions with other men, and as such, every method should previously be taken to deter him from vice, rather than trust to a reformation by

by punishment; that punishments must sometimes be inflicted, is most certain; in such instances let it be exemplary, for the sake of the multitude; but let there be ever shewn a greater desire to reward than to punish.

THE END.

E. J. M.

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